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82-630

No._____

IN THE

Supreme Court of the United States

October Term, 1982

DIANE TISCHENDORF, now DIANE MONTGOMERY,
Petitioner,

vs.

PETER TISCHENDORF,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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QUESTION PRESENTED

Did the Minnesota Supreme Court err when it held that a nine and one-half year old citizen does not have the constitutional right to remain within the territorial boundaries of this country even though it was found that the child was bright, articulate and had a genuine fear of being detained in a foreign country.

LIST OF PARTIES IN PROCEEDING BELOW

Diane Montgomery, formerly Diane Tischendorf, was an Appellant and Peter Tischendorf was the Respondent in the proceeding before the Minnesota Supreme Court. William J. Hempel, an Appellant in the proceeding below, is not seeking review of the decision denying him an appointment as guardian ad litem of the minor.

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IN THE

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October Term, 1982

No. _____

DIANE TISCHENDORF, now DIANE MONTGOMERY,
Petitioner,

vs.

PETER TISCHENDORF,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

Petitioner, Diane Tischendorf, now Diane Montgomery, respectfully petitions this Court for a writ of certiorari to review an order of the Minnesota Supreme Court entered in this case on July 9, 1982.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court (App. A, infra, A-1) is reported at 321 N.W.2d 405 (Minn. 1982).

The orders of the Honorable Joseph P. Summers, Judge of the Ramsey County District Court, dated July 25, 1980 (App. B, infra, A-22), June 13, 1980 (App. C, infra A-26) and May 3, 1979 (App. D, infra, A-28) are presently unreported.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on July 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, provides in relevant part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises from the attempt by Peter Tischendorf, a citizen of West Germany, to force his then nine and one-half year son Thomas, a United States citizen and resident of Minnesota, to leave the United States for a visitation in West Germany. The Ramsey County District Court, St. Paul, Minnesota, had granted Diane Montgomery, formerly Diane Tischendorf, the child's mother, a default dissolution from Tischendorf on May 17, 1977. The court awarded her permanent and exclusive custody of the child and issued a restraining order against Tischendorf after he had threatened to take the child and keep him in Germany. Tischendorf obtained a default dissolution judgment in West Germany.

In March 1979, Tischendorf moved to modify the original Ramsey County divorce decree, chiefly requesting visitation privileges with the child in both Minnesota and West Germany. A hearing was held on May 3, 1979 before Judge Joseph Summers, who granted Tischendorf broad rights to visit with Thomas in the United States and in West Germany each summer.

Two brief visitation experiences in Minnesota between Tischendorf and the child occurred between May 1979 and May 1980. These brief contacts between father and son produced anxiety, fear and hostility in the child. The child has stated on numerous occasions, including twice under oath before Judge Summers and Montgomery's attorney, that he does not wish to leave the United States. Thomas fears he will be detained when once abroad.

In May, 1980 Tischendorf requested visitation with his son in West Germany for the following August. Judge Summers issued a *sua sponte* order on June 13, 1980 requiring Montgomery to "turn over" Thomas on August 1, 1980 for transportation to West Germany. Montgomery, fearing that her son would not be allowed to return to the United States, then moved the trial court to deny the proposed visitation in West Germany until, among other things, Thomas agreed to go. On July 23, 1980, William J. Hempel applied to be appointed guardian ad litem for Thomas and moved to intervene.

The court denied the motions of Montgomery and Hempel on July 25, 1980. In the order denying Montgomery's motion Judge Summers explicitly directed her to prepare Thomas for a three-week stay in Germany beginning 12:00 noon on August 1, 1980 and provided that a violation of the order would be contempt of court. Both Montgomery and Hempel filed timely

notices of appeal to the Minnesota Supreme Court. On July 27, 1980, the trial court stayed its orders requiring visitation in West Germany upon the filing of a supersedeas bond. The appellants filed the bonds. Following a hearing before six members of the Minnesota Supreme Court on July 31, 1980, Tischendorf's motion to vacate the stay was denied.

On July 9, 1982 the Minnesota Supreme Court affirmed the trial court's decision forcing the child to leave the United States and denying Hempel's application for appointment as a guardian ad litem. It ruled that a child does not have an independent constitutional right to remain in the United States if a court determines that it is in the best interests of the child to leave the country. Although the court required certain conditions purporting to assure Thomas that he would be returned to the United States, the danger remains that if he is forced to leave he will not be able to return to this country.

The constitutional issues sought to be reviewed were first heard before Judge Joseph P. Summers of the Ramsey County District Court July 14 and July 24, 1980 on the Notice of Motion, Motion and Memorandum in Support of Motion of Montgomery dated July 8, 1980. (App. E, infra, A-31). In his July 25, 1980 order, Judge Summers made no ruling on the constitutional issues. These issues were again fully briefed and argued before the Minnesota Supreme Court. The Minnesota Court ruled that the constitutional issues had been validly raised in the District Court. *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Mn. 1982); A-1.

REASONS FOR GRANTING THE PETITION

1. When A Citizen Is Forced To Leave The United States He Loses All Protection Of The Constitution And Laws Of The United States.

The increased number of marriages between spouses of different nationalities has spawned new issues regarding the custody of children following divorce. These issues are of worldwide concern. Affidavit of Brigette M. Bodenheimer, A-50. The absence of applicable international agreements on family law issues only exacerbates these problems.

Most countries protect their citizens who detain or abduct their children who live in foreign countries. It is difficult to obtain the return of an American child from a foreign country when he is held there by a foreign parent. That parent's own national laws often honor the detention, effectively disregarding prior American custody awards to the other parent.

The full extent and range of the international problems involved in this case are revealed by the experience of the Office of Citizens Consular Service of the Department of State. Letter of J. Brian Atwood, Assistant Secretary for Congressional Relations, to former Vice President Walter F. Mondale, A-56. The Assistant Secretary reported that about 300 cases were then pending in the Department involving American children taken to or detained in foreign countries by non-custodial parents. He stated that United States consular officers have no legal authority to obtain physical custody of children and return them to the United States. They cannot offer legal advice, represent U.S. citizens in custody hearings before foreign courts, or attempt to influence the outcome of those hearings. Many of these children are lost to their American parents and deprived of all contact with their homeland.

The Hague Conference on Private International Law recognized the seriousness of this problem in 1976. For this reason, it placed the subject of international child abductions, including child retentions after visitations, on its working agenda for 1976-1980. The Conference has drafted a Convention under which signatory governments would assure the return of wrongfully removed or retained children to the country of origin and to the rightful custodian. It will take a long time, perhaps years, before it will go into effect between the various countries involved. The United States has not ratified the Convention. There are also no treaties between the United States and most other nations, including West Germany, which resolve these issues.

When a minor citizen is forced by a state court to leave the territorial limits of the United States he loses all protection of our Constitution. If the child's noncustodial parent takes the child abroad and refuses to let the child return to the United States, the foreign parent's action, while illegal under American law, will most likely be honored by the foreign country. The child then becomes subject to the laws of that country, effectively losing the protection of the United States Constitution.[1]

The Constitution grants certain rights to all United States citizens. It guarantees a recognized bundle of rights to citizens who are adults and also guarantees a certain bundle of rights to citizens who are minors. While it may be proper to give to a minor a smaller bundle of rights, *Bellotti v. Baird*, 443 U.S.

[1] It should be noted that Montgomery provided credible evidence to the lower courts delineating both Tischendorf's intention to detain Thomas in West Germany and the difficulties she would encounter in obtaining the return of the child. Indeed, under German law, Tischendorf is entitled to legal custody of Thomas even though a conflicting American custody decree exists. *See, Tischendorf v. Tischendorf*, 405 N.W.2d 405, 413-416 (Yetka, Wahl, JJ., dissenting opinions); A-15.

622, reh. denied, 444 U.S. 887 (1979), a court must not be permitted to take away the child's bundle altogether and leave him without any protection under the Constitution.

The *Tischendorf* court has risked the loss of all of Thomas' constitutional rights by forcing the child to leave the United States for a visitation. The crucial error in its reasoning is its failure to distinguish between judicial actions which, on the one hand, decide whether the child receives the larger or smaller bundle of rights and, on the other hand, those actions which take even the smaller bundle away from the child altogether.

The court held that Thomas' entitlement to his constitutional rights hung on whether he could exercise those rights intelligently. Thomas is not asserting that he has the right to choose between the larger adult bundle of rights and the smaller bundle for children. Nor is the issue whether Thomas has a right to choose when, where, or whether he should have visitation with his noncustodial father. Instead, the issue is whether the court may jeopardize the entire bundle of children's rights, and, hence, risk loss of all his rights by forcing him to leave the United States.[2]

---

[2] The Petitioner is not asking the Court to decide that all minors, no matter how young, have the right not to be forced to leave this country. However, there is undisputed evidence in the record below demonstrating that Thomas clearly understands the serious implications of leaving this country. The trial court below found that "Thomas' real fear is not of *visiting* Germany but of being *detained* in Germany. This is a genuine fear and the court is concerned about it. . .", Order and Memorandum, Judge Joseph P. Summers, July 28, 1980, A-28. The Minnesota Supreme Court not only directly quoted this finding in its opinion, 321 N.W.2d 405, 412, A-13, but also recognized that the child is "bright and articulate", 321 N.W.2d 405, 407, A-15. In the face of this evidence, the court in *Tischendorf* nevertheless held that Thomas did not have a constitutional right not to be forced to leave the country because he lacked the intelligence to exercise it. In effect, the court has held that no nine and one-half year old minor under any circumstances can exercise such a constitutional right. This ruling is contrary to law.

The lower courts have confused this issue. In *Bergstrom v. Bergstrom*, 296 N.W.2d 490 (N.D. 1980), the court ruled only that a child's preference should be considered in determining the best interests of the child. The court in *Schleiffer v. Meyers*, 644 F.2d 656 (7th Cir. 1981), cert. denied, 454 U.S. 823 (1981), treated the constitutional issue as merely a "factor" in the family relationship. And in *Zaubi v. Hoejme*, 530 F.Supp. 831 (W.D. Pa. 1980), the court suggested that any constitutional right of the child should be subverted to a decision of the "best interests" of the child and abstained from deciding the constitutional issue.

The issue is ripe for decision by the United States Supreme Court. There is a pressing need for a clear determination to clarify the confusion in the lower courts. The courts should not, under the guise of a best interests analysis, no matter how well intentioned, render decisions which erode childrens' rights and deprive them of their basic opportunity to be reared under the protection and privileges of the Constitution and laws of the United States.

2. The Minnesota Supreme Court's Decision Forcing A Child Citizen To Leave The United States Contravenes The Intent Of Prior Rulings Of This Court.

Thomas, a citizen of the United States, has unequivocally expressed his desire to remain in this country. An elemental right of any citizen is the right to remain here to enjoy the rights, privileges and immunities guaranteed by the Fourteenth Amendment of the Constitution. Loss of that right—expatriation—can only take place at the initiative of the citizen, not the government. Compelling travel to a foreign country also infringes upon the federal right to travel. Although a minor, Thomas enjoys those same federal constitutional rights.

A. A Citizen of the United States has the Right to Remain in this Country.

The jurisprudence of this country contains few instances paralleling the compelled deportation of a United States citizen. Where loss of citizenship has been threatened the courts have recognized the value of citizenship and afforded it protection. *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Vance v. Terrazas*, 444 U.S. 252, reh. denied, 445 U.S. 920 (1980). Once Congress acts to grant citizenship, it has no power to take it away. As the *Vance* court stated, "in the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct." *Id.* 260. Absent an intent on the part of the citizen to terminate that status, it may not be lost or taken away by the government.

This Court has recognized that the forced departure from this country deprives the citizen of protection of the Constitution. In *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922), Mr. Justice Brandeis wrote,

> To deport one who so claims to be a citizen, obviously deprives him of liberty. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.

The Constitution guarantees that citizens may reside wherever they wish, whether abroad or in any state. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right of interstate travel); *Schneider v. Rusk*, 377 U.S. 163 (1964) (naturalized citizen's

right to live abroad without losing citizenship); *Kent v. Dulles*, 357 U.S. 116 (1958) (right to obtain passport). This Court in *Kent* described this right "as part of the 'liberty' of which the citizen cannot be deprived without due process of law." *Id.* at 125.

A citizen may also choose not to travel to another country. The decision to remain here is "as close to the heart of the individual as the choice of what he eats, or wears, or reads." *Id.* at 126. Indeed, the "only absolute and unqualified right of citizenship is to residence within the territorial boundaries of the United States." *United States v. Valentine*, 288 F.Supp. 957, 980 (D.P.R. 1968). *See also, Worthy v. United States*, 328 F.2d 386 (5th Cir. 1964), which held unconstitutional a statute penalizing a citizen for entering the United States without a valid passport.

If a citizen is compelled to travel to another country, he must, as a physical necessity, lose any ability to exercise his right to travel elsewhere. Compelled travel not only infringes the right to travel, but by removing the citizen from the United States it deprives him of other federal rights guaranteed by the Fourteenth Amendment. Such a deprivation can occur only upon a showing of "the gravest imminent danger to the public safety." *Korematsu v. United States*, 323 U.S. 214, 218 (1944), reh. denied, 324 U.S. 885 (1945).

B. The Right to Remain in the United States Extends to Minors.

This Court has been reluctant to define "the totality of the relationship of the juvenile and the state." *In Re Gault*, 387 U.S. 1 (1967). It has, however, long recognized that children, like adults, possess constitutional rights. These rights do not mature and come into being magically only when one attains

the state-defined age of majority. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). Indeed, the rights of children have resulted in watershed constitutional decisions. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954).

In many contexts, this Court has held that children may not be deprived of their federal constitutional rights. *See, e.g., Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (wearing armbands in school to protest Vietnam war); *School District v. Schempp*, 374 U.S. 203 (1963) (compelled prayer in schools); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (decision of minor to have an abortion); *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment of school children); *Goss v. Lopez*, 419 U.S. 565 (1975) (suspension from school); *Carey v. Population Services International*, 431 U.S. 678 (1977) (right to obtain contraceptives); *Parham v. J.R.*, 442 U.S. 584 (1979) (commitment to state mental institution by parents).

Thomas' minority does not impact his constitutional rights. As Justice Brennan wrote in *Carey v. Population Services International*, 431 U.S. 678, 692 (1977), "[M]inors are entitled to constitutional protection for freedom of speech, equal protection against racial discrimination, due process in civil contexts and a variety of rights of defendants in criminal proceedings . . . (citations omitted)." Although the Court has not yet articulated a precise test to differentiate the rights of juveniles from adults, it is clear both enjoy the protection of the Constitution.

Courts have protected children from the forced removal from this country. *Acosta v. Gaffney*, 558 F.2d 1153 (3d Cir. 1977); *Lopez v. Franklin*, 427 F.Supp. 345 (E.D. Mich. 1977);

and *Bergstrom v. Bergstrom*, 478 F.Supp. 434 (D.N.D. 1979), vacated on jurisdictional grounds, 623 F.2d 517 (8th Cir. 1980), all recognized that a child citizen has a federal constitutional right to remain in the United States. In *Acosta* and *Lopez* adult aliens had given birth to a minor child while they were illegally present in the United States. Subsequently, the Immigration and Naturalization Service ordered the parents deported. Although no deportation orders were issued against the minor citizens, it was argued that deportation of their parents would result in a *de facto* deportation of the minor citizens.

The *Acosta* court, discussing the constitutional rights of child citizens, stated:

> The constitutional right upon which Lina relies is somewhat broader than she describes it. It is the fundamental right of an American citizen to reside wherever he wishes whether in the United States or abroad, and to engage in the consequent travel. *See Schneider v. Rusk*, 377 U.S. 163, 168, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964); *Kent v. Dulles*, 357 U.S. 116, 125, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958). It is the right to exercise a choice of residence, not an obligation to remain in one's native country whether one so desires or not, as is required in some totalitarian countries. In the case of an infant below the age of discretion the right is purely theoretical, however, since the infant is incapable of exercising it . . .

558 F.2d at 1157-58.

The orders deporting the parents were upheld in both cases. Both courts relied on the extreme youth of the children. The *Lopez* court further explained that the government had not forced the minor children to leave. Instead, the parents chose

not to stay in the United States, thereby forcing the children to leave as well. 427 F.Supp. at 349.

By contrast, in *Bergstrom* the court found that the minor citizen, then eight years of age, had sufficient discretion and intelligence to make a reasoned choice whether to leave the United States in order to reside with her mother in Norway. The mother, a resident of Norway, was entitled to custody of the child under a divorce decree. The child commenced an action in United States District Court asking that her mother be restrained from carrying out the requirement of the decree that she be returned to Norway. The court granted the requested relief, holding:

> The central privilege of America [sic] citizenship is the right to live in the United States as long as one sees fit. . . .
>
> This Court has been shown no laws, statutes or holdings which would authorize a court of domestic relations to remove a minor American citizen from the protection of the Constitution and laws of the United States against her will.

478 F.Supp. at 440. The Eighth Circuit Court of Appeals vacated the trial court order on jurisdictional grounds without reaching the merits, noting that after the district court's injunction the entire matter had been litigated in the North Dakota state district court and that an appeal was pending in the North Dakota Supreme Court.

The right to remain in the United States is fundamental. The decision to do so is momentous. Its very importance therefore demands that the courts apply the same standards to an adult and a minor citizen. The *Tischendorf* court has not done so. It has held that a child must leave the United

States against his will in the face of evidence that he does not wish to leave and that he will not be allowed to return. Indeed, the court refused even to consider that a child has the right to refuse to leave the United States.

CONCLUSION

For the above reasons this Court should grant Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

Ramsey County
Otis, J.
Dissenting, Wahl, J.
and Yetka, J.
Took no part,
Kelley, J.

In the Matter of the Marriage of
Diane Tischendorf (now Diane Montgomery), petitioner,
Appellant (51614),

51614, 51615 vs.

Peter Tischendorf,
Respondent,

William J. Hempel,
Appellant (51615).

Endorsed
Filed July 9, 1982
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

Where the divorced parents of a child have stipulated to custody in the mother, residing in the United States, and visitation rights of the father, residing in West Germany, the child does not have an independent constitutional right to remain in the United States if it is judicially determined that it is in his best interests to visit his father in Germany.

Under such circumstances it is proper and appropriate for the court to impose conditions of visitation designed to imple-

ment the enforcement of the Minnesota decree and to prevent a foreign jurisdiction from frustrating the terms of that decree as it governs the parents' respective rights to custody and visitation.

Remanded.

Heard, considered and decided by the court en banc.

OPINION

OTIS, Justice.

This case involves appeals from two related proceedings in the trial court.

The first appeal is from the order of the Ramsey County District Court dated July 25, 1980, denying a motion by appellant Diane Montgomery, formerly Diane Tischendorf, that sought to modify a prior court order. The prior order, dated December 26, 1979, amended a 1977 judgment and decree of dissolution and directed that respondent be allowed visitation with the parties' minor son, Thomas Tischendorf, in both this country and respondent's native West Germany.

The other appeal is from an order of July 25, 1980, denying Attorney William Hempel's motion to intervene and for his appointment as a guardian ad litem for Thomas Tischendorf.

We modify the conditions for visitation prescribed by the trial court but otherwise affirm.

The principal parties to this proceeding, appellant Diane Montgomery and respondent Peter Tischendorf, were married in Minneapolis, Minnesota, on September 8, 1968. Appellant Montgomery is a native citizen of this country and respondent Tischendorf is a native citizen of the Federal Republic of Germany (West Germany). The only child of the parties and the focus of this dispute, Thomas Tischendorf, born December 25, 1970, is a bright and articulate child.

After their marriage, the couple lived in the United States and each pursued graduate studies. In 1969, they moved to Hamburg, West Germany, where Thomas was born. In August of 1974, appellant returned to this country with the child. There is some dispute as to whether the family had planned to reside permanently in West Germany or the United States. After infrequent visits between the two countries, the marriage deteriorated.

In May of 1976, respondent petitioned the German court for a divorce and claimed appellant's desertion as a ground for such divorce. Appellant shortly thereafter instituted divorce proceedings in the Ramsey County District Court. The German court took note of the American dissolution proceeding but concluded that the American court was without jurisdiction. Appellant did not appear or defend in the German proceedings and on March 11, 1977, the German court granted respondent a divorce after determining that appellant was the "guilty" party. After respondent's default in the American proceeding, the Ramsey County District Court issued a judgment and decree on May 17, 1977, that dissolved the marriage and awarded the exclusive custody of Thomas to appellant.

In the period that followed, there were unsuccessful efforts by both parties to work out an acceptable visitation structure. In January of 1979, respondent formally moved for an amendment of the May 1977 judgment and decree of dissolution granted by the Ramsey County District Court in order to secure definite visitation rights. A later motion in March of 1979 was made by respondent to provide for regular visitation, to determine support obligations and to resolve the issue of property division between the parties. Appellant moved the court to change venue of the case to Hennepin County and to continue the hearing on respondent's motion. Appellant's motion was denied.

After a hearing on respondent's motions, the trial court issued its order dated May 3, 1979, that provided respondent was entitled to visitation both in this country and in West Germany. The order specifically approved a visit to West Germany in the summer of 1980. The May 3, 1979 order also made respondent's visitation rights conditional. These conditions included a requirement that an irrevocable letter of credit in the amount of $10,000 be provided by respondent as an assurance that Thomas would be returned to the custody of appellant and a requirement that respondent execute an agreement acknowledging appellant's right to custody and the jurisdiction of the trial court. Respondent complied with these conditions.

Appellant's concern over whether Thomas could be detained in Germany prompted her to move the court for an amendment of the May 3, 1979 order. That motion was denied and on December 26, 1979, the May 1977 Judgment and Decree of dissolution was amended to reflect respondent's visitation privileges.

Some visitation between respondent and his son occurred in Minnesota during March of 1980. An agreement was also reached by the parties with respect to Thomas' trip to Germany between August 1 and August 22, 1980. The trial court was made aware of the proposal and recommended that objections to the plan be heard on or before June 13, 1980. After meeting with counsel on June 13, 1980, the court ordered that objections to the proposed itinerary be heard on July 14, 1980. Thereafter, appellant moved the court to deny all visitation, specifically that scheduled to take place in Germany.

There was evidence presented at the hearing on appellant Montgomery's motion that suggested respondent could successfully gain custody of Thomas through a German court and

prevent his return to this country. Evidence of Thomas' reluctance to travel to Germany and the psychological impact of such a trip on Thomas was also presented by appellant. Respondent countered such evidence with an affidavit from his German counsel that indicated respondent's detention of Thomas in Germany would subject respondent to criminal prosecution. The court also interviewed Thomas about his desire not to travel to Germany to visit his father.

Several days after the hearing on July 14, 1980, appellant Hempel moved the court for an order granting him leave to intervene and for his appointment as guardian ad litem for Thomas. On July 25, 1980, the trial judge issued his order denying both appellant Montgomery's motion and appellant Hempel's motion. These appeals followed.

Respondent's motion in this court to vacate a stay of the lower court order was denied on July 31, 1980.[1]

Appellant Hempel's motion to intervene and for his appointment as guardian ad litem was denied by the trial court because (1) Minn. Stat. § 518.165 required such denial, (2) the motion was untimely, and (3) the child's interests were adequately represented.

Minn. Stat. § 518.165 (1980) concerns the appointment of guardians in dissolution proceedings and provides as follows:

> In all proceedings for child custody or for dissolution or legal separation where custody or visitation of a minor child is in issue, *the court may appoint a guardian ad litem from a panel established by the court* to represent the interests of the child. The guardian ad litem shall advise the court with respect to custody, support and visita-

[1] Respondent has also moved for an order to expand the record before this court to include certain additional evidence. Because the submitted evidence would not aid the court in the disposition of this case, that motion is hereby denied.

> tion. The court may enter an order for costs, fees and disbursements in favor of the child's guardian ad litem. The order may be made against either or both parties, except that any part of the costs, fees, and disbursements which the court finds the parties are incapable of paying shall be borne by the county.

(Emphasis added.)

The language of the statute clearly contemplates that the court can, in its discretion, appoint an *independent* guardian. Appellant Hempel was selected by appellant Montgomery, was not a member of the panel referenced by the statute, and therefore cannot be considered to be a disinterested party.[2]

In addition, appellant Hempel's motion was brought on July 23, 1980, only a few days prior to Thomas' scheduled departure for Germany. No attempt to secure a guardian for the child was made throughout the proceedings conducted in 1979 or the first half of 1980 when issues of visitation were addressed. Because of this delay, the trial court determined the motion

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[2] Appellant Hempel contends that section 518.165 is not the only method by which a guardian may be appointed. He argues that Minn. R. Civ. P. 17.02 is also applicable to this case and that the trial court erred in not proceeding under that rule. Rule 17.02 *requires* the court to appoint a guardian if a minor or incompetent is not represented in a pending action. The application of this rule to dissolution proceedings whenever visitation is an issue would require all children to have court-appointed guardians. The rule was not intended to have such a result.

In addition, Minn. R. Civ. P. 81.01(1) provides that the Rules of Civil Procedure are not applicable to proceedings instituted under Minn. Stat. ch. 518 insofar as the rules are inconsistent or in conflict with these statutes. The fact that section 518.165 specifically deals with the appointment of a guardian under different conditions than those set forth in Rule 17.02 compels a conclusion of inconsistency between the two provisions. This inconsistency renders the rule inapplicable to dissolution proceedings under Rule 81.01(1).

to be untimely. Minn. R. Civ. P. 24.01 expressly provides that intervention will be permitted "[u]pon timely application" of an interested party. Given the circumstances, the trial court correctly denied appellant Hempel's motion to intervene because it was not timely made.

The trial court also concluded that the child's interests in this proceeding were adequately represented and therefore intervention by a guardian was not warranted. While we hold that appellant Hempel's motion was properly denied for the reasons stated above, our disposition of this case may prompt the trial court, on remand, to select an independent guardian pursuant to section 518.165 to assure that Thomas' interests are adequately represented. Our decision as to this issue merely forecloses an attempt by either party to select counsel to serve as guardian.

Respondent asserts that appellant Montgomery failed to make a timely appeal of the trial court's visitation determination and, therefore, this court is without jurisdiction to hear the appeal. In Minnesota, the failure to make a timely appeal is a jurisdictional defect. Minn. R. Civ. App. P. 126.02; *see Schaust v. Town Board of Hollywood Township*, 295 Minn. 571, 204 N.W.2d 646 (1973) (per curiam).

Appellant Montgomery did not seek review of the May 3, 1979 order granting visitation privileges to respondent, the June 7, 1979 order confirming the May 3, 1979 order, or the December 26, 1979 amendment of the original judgment and decree of dissolution that permitted visitation by respondent. The appeal from the July 25, 1980 order denying appellant Montgomery's request for modification of the visitation rights of respondent was timely, however.

Respondent's contention is that the motion that resulted in the July 25, 1980 order and the appeal generated by that order

constituted an attempt by appellant to delay the scheduled visitation. Procedural tactics such as that alleged by respondent are not permitted. *McCrank v. McCrank*, 239 Minn. 488, 59 N.W.2d 309 (1953).

Minn. Stat. § 518.175, subd. 5 (1980) concerns the review by the trial court of previous visitation orders and provides as follows:

> The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child, but the court shall not restrict a parent's visitation rights unless it finds that the visitation is likely to endanger the child's physical or emotional health or impair his emotional development. If the custodial parent makes specific allegations that visitation places the custodial parent in danger of harm, the court shall hold a hearing at the earliest possible time to determine the need to modify the order granting visitation rights. The court may require a third party, including the county welfare board, to supervise the visitation or may restrict a parent's visitation rights if necessary to protect the custodial parent from harm.

This provision makes it clear that a court can entertain a request for modification of visitation orders when changed circumstances suggest the child may be physically or emotionally harmed by visitation. *See Moss v. Moss*, 274 Minn. 362, 143 N.W.2d 844 (1966). Appellant's motion contained allegations of such a change in circumstances. Appellant cited the boy's fear of his father, the failure of respondent to develop a healthy father-son relationship, and the detrimental impact on the child should he be detained in Germany. These allegations were sufficient to permit the trial court to hear appellant's motion and for her to seek a review in this court of the denial of that motion.

Because appellant's July 1980 motion was properly before the trial court and the appeal from the denial of that motion was timely, this court has jurisdiction to hear the appeal.

Respondent contends that appellant did not address the constitutional issues in the court below and that the failure to raise such issues in the trial court prevents this court from addressing those issues. *Tourville v. Tourville*, 292 Minn. 489, 198 N.W.2d 138 (1972) (per curiam).

Appellant correctly points out that the constitutional issues were raised in her July 1980 motion. There is also authority for the proposition that constitutional rights can be asserted on appeal when the interests of justice require consideration of such issues, when the parties have had adequate time to brief such issues, and when such issues are implied in the lower court. *Singleton v. Wulff*, 428 U.S. 106 (1976); *Walters v. Common School Districts*, 265 Minn. 284, 121 N.W.2d 605 (1963); *Laufenberg v. Cosmetology Examining Board*, 274 N.W.2d 618 (Wis. 1979).

The fact that the constitutional issues were raised in appellant's July 1980 motion, that all parties have briefed the issues, and that there is at least a suggestion that the child may never be returned to this country are sufficient to justify this court's consideration of the constitutional questions presented.[3]

The constitutional right asserted by Thomas in this case is the right not to be compelled to leave the territory of the United States. It cannot be disputed that such a right exists in an adult citizen of this country.

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[3] Respondent also contends, however, that the decision in Ryan v. Ryan, 300 Minn. 244, 219 N.W.2d 912 (1974), precludes appellant from raising her constitutional claim. We need not address this point, however, as we have determined that appellant's arguments that her constitutional rights have been violated are without merit.

While children do possess constitutional rights, some of those rights may not become operative unless it can be demonstrated that the child can exercise them intelligently.

In *Acosta v. Gaffney*, 558 F.2d 1153 (3d Cir. 1977), the court was concerned with an action instituted by an infant to stay the deportation of her Columbian parents. The child was born in this country while her parents were illegally residing here. It was alleged that the deportation of the child's parents would be an unconstitutional deprivation of her rights and privileges as a native-born American citizen. The *Acosta* court recognized the existence of a constitutional right to travel or not to travel. However, the court indicated that such a right does not mature in an individual until he or she can exercise it intelligently. In reaching this result, the court stated:

> The constitutional right upon which Lina relies is somewhat broader than she describes it. It is the fundamental right of an American citizen to reside wherever he wishes, whether in the United States or abroad, and to engage in the consequent travel. [Citations omitted.] It is the right to exercise a choice of residence, not an obligation to remain in one's native country whether one so desires or not, as is required in some totalitarian countries. In the case of an infant below the age of discretion the right is purely theoretical, however, since the infant is incapable of exercising it * * *.
>
> * * * * *
>
> The right of an American citizen to fix and change his residence is a continuing one which he enjoys throughout his life. Thus while today Lina Acosta, as an infant twenty-two months of age, doubtless desires merely to be where she can enjoy the care and affection of her

> parents, whether in the United States or Columbia, *she will as she grows older and reaches years of discretion be entitled to decide for herself where she wants to live and as an American citizen she may then, if she so chooses, return to the United States to live* * * *. [Emphasis added.]

558 F.2d at 1157-8.

In *Bergstrom v. Bergstrom*, 296 N.W.2d 490 (N.D. 1980), the North Dakota Supreme Court was presented with the question of whether an 8-year-old girl had a constitutional right not to be compelled to reside with her mother in Norway. The *Bergstrom* court did not decide the constitutional issue because it was determined that the lower court erred in concluding that residence in Norway was in the best interests of the child.

We are of the opinion that this boy at the age of nine years, lacked the ability to assess the value of building an enduring relationship with his father. The appellant suggests that during the visit with Thomas in 1979 and 1980 that his father told him there were excellent schools in Germany and made it clear, at least to the boy, that respondent's intent was to keep Thomas in Germany once he arrived there on visitation. The precise dialogue between counsel, the court and Thomas was this:

> MR. KANE: Did he talk to you about going to school during visitation, the three weeks you were over there?
>
> THOMAS: Yes.
>
> * * * * *
>
> MR. KANE: Did he talk about going to school in the winter too?
>
> THOMAS: No. He just said I would go the three weeks.

COURT: * * * Now your father has not had a lot of contact with you over the years, but one thing you ought to know, one of the reasons for that is at about the time you were between five and six another judge ordered, issued what is called a court order which forbids or forbade your father from contacting, seeing or visiting with you. I didn't do it and we don't have to go into details why it was done; but to some extent the fact that he has been neglectful has been in accordance with an order of this court. That is why you haven't heard from him; but you should know that.

What I want to do is in your best interests. It may or may not be exactly what you want to do.

I am wondering whether your concern about going to Germany is mostly you don't want to go or mostly you are afraid your father won't send you back and you will have to stay there?

THOMAS: Because I am afraid that he might not send me back here.

COURT: Okay. Is that mostly because he showed you pictures of your room or the house and talked about the schools?

THOMAS: Yes.

COURT: That scares you a lot?

THOMAS: Yes.

In a matter of such critical importance as the bond between father and son, the findings of a trial judge who, in his words, has "agonized" over his decision, should not be lightly set aside or ignored. The court noted:

> It is impossible for Thomas' father to re-establish a meaningful relationship with Thomas by brief visits in the United States. Unless there is an extended visit this

year it is unlikely that the erosion in Thomas' perception of his father can be checked.

The court is aware that Thomas does not feel like going to Germany this year. However, it often occurs in the lives of parents and the courts that children do not want to do what is deemed best for them. Thomas' real fear is not of *visiting* Germany but of being *detained* in Germany. This is a genuine fear, and the court is concerned about it. The court believes, however, that he will be returned safely to the U.S. and will be better for the experience.

In assessing the validity of the concerns expressed by Thomas, several factors of critical importance should be kept in mind. In March of 1980 Mrs. Montgomery voluntarily entered a formal stipulation as follows:

"b. Summer, 1980, respondent shall have visitation in Germany for a period of twenty-two (22) days which shall be exercised at a time selected commencing during the period of the last week of July, July 28, 1980, through the first week in September, 1980."

Thomas's mother at that time apparently had no misgivings concerning the likelihood of Dr. Tischendorf's returning their son to America. It is a reasonable assumption that the initiation of adoption proceedings by Thomas's stepfather triggered Mrs. Montgomery's reluctance to fulfill the commitment she made in her earlier stipulation.

It is essential, also, not to lose sight of the fact that we are not dealing with a custody matter but only with visitation rights. What may be in the best interests of Thomas as to the former status do not necessarily apply to the latter.

The trial court, having before it all the evidence, made a finding that "the court believes, on the basis of [Dr. Tischendorf's] demeanor, his personal situations, and all the evidence,

that he will return the child. * * * The court is satisfied that Dr. Tischendorf will return Thomas to the United States at the end of August and that no further security is required."

Thomas was born in Germany and his father and grandparents reside in that country. He himself spoke German fluently as a small child. Although his mother also had a competent command of spoken German, she has permitted her son's grasp of that language to lapse. It hardly seems necessary to rely on the testimony of experts to determine whether or not a son can derive benefits from cultivating a relationship with his natural father, particularly where the father is a person of good character, highly educated, in a responsible professional position, and is reaching out to encourage his son's pride in his roots. To deny Thomas an opportunity for exposure to the family and culture of his European forebears is not in his best interests, if adequate safeguards are imposed to guarantee his return.

Accordingly we affirm the trial court's decision to permit Dr. Tischendorf to visit with his son in Germany for three weeks during the summer months, but remand for the trial court to include the following conditions: (1) increase the letter of credit to Mrs. Montgomery from $10,000 to a larger amount; (2) require Dr. Tischendorf to furnish round-trip transportation for an adult companion to accompany Thomas to Germany; (3) require Dr. Tischendorf to obtain an order from an appropriate German court which will recognize the exclusive jurisdiction of American courts for determining Thomas's custody and which acknowledges the duty of German courts to enforce appellant's right to custody, subject to respondent's stipulated right of visitation.

Remanded.

KELLY, J. took no part in the consideration or decision of this case.

YETKA, Justice (dissenting in part).

I concur with the majority opinion insofar as it remands to the trial court for consideration of the four conditions set forth therein. I would hold, however, that there is a constitutional right not to be compelled to leave this country, based on the right to travel and as a fundamental incident of citizenship. *See, e.g., Kent v. Dulles*, 357 U.S. 116 (1958). Once outside the territory and jurisdiction of the United States, a citizen is deprived of the guaranty of the rights and liberties accorded by our constitution. This consideration is particularly applicable in this situation where it is possible that the respondent could gain custody of Thomas in West Germany and prevent his return to the United States.

Moreover, the mere fact that a citizen is a minor does not deprive him of his constitutional rights. Specifically, if Thomas demonstrates the maturity, capacity and intelligence to make an informed decision, he should be allowed to do so. *See Belloti v. Baird*, 443 U.S. 622 (1979). Alternatively, if Thomas is not found to be mature enough to make the decision, then I would hold that, under these facts, where there is a contest between the natural parents, the trial court must appoint an independent guardian ad litem to represent the boy's interest. Thomas is admittedly bright and articulate, yet the majority denies him the ability to decide for himself. When this case first reached us, Thomas was only 10 years old. He is now 11 and will be 12 later in the year. I would remand the question of Thomas' ability to decide for himself, based on considerations of maturity, intelligence and age, to the trial court. If the trial court still is of the opinion that Thomas is incapable of deciding for himself, I would require the trial court

to appoint an independent guardian under Minn. Stat. § 518.-165 (1980).

I should also add that I cannot see how it is in the best interests of either the child or his parents to force Thomas to visit West Germany at this time. The father is able to visit Thomas in this country, as he has done. Moreover, as Thomas becomes wiser and more mature, he may wish to travel to West Germany to visit his paternal grandparents and his father. If he is forced to do so now, however, the mandatory nature of his travel may extinguish his desire to visit West Germany in the future. Rather than help build an enduring relationship with his father, forcing the issue at this time might have the opposite effect and result in resentment.

WAHL, Justice (dissenting).

I must respectfully dissent. On the record before this court it is evident that the order of the trial court is based on an implicit but clearly erroneous finding of fact that visitation in Germany for 3 weeks during the summer months would be in the best interests of the child, Thomas, at this time. It is true, and the majority opinion places great emphasis on the fact, that Diane Montgomery, the custodial parent, after entry of judgment providing for visitation, agreed by formal stipulation in March of 1980 that Peter Tischendorf would have visitation with his son for 3 weeks in Germany during the summer of 1980. It is also true, however, that, before that proposed visitation, Thomas was reinterviewed by Dr. Kenneth A. Perkins, a licensed clinical psychologist who had seen Thomas several times since April of 1979, and Dr. James H. Gilbertson, a second licensed and highly qualified clinical psychologist. Both psychologists concluded, in affidavits presented to the court, that the scheduled visitation would not be in the child's best interests because of fear and apprehension generated by a perceived threat to detain him in Germany.

The psychologists found Peter Tischendorf not to be the psychologically bonded parent nor to have shown any concern for Thomas' own needs or desires. The court-ordered visitations in this country in 1979 and 1980, before the proposed 1980 summer visitations, had failed to establish the meaningful, trusting relationship between father and son which had been hoped for but which had had the opposite effect. Dr. Perkins found, after the July 1979 visit, when the father continually lectured and told the boy about his coming to live in Germany and showed him pictures of his "new" German school (which he could scarcely attend in a 3-week visitation period), that Thomas was under severe stress and anxiety as a result and that "forced involvement with this person, particularly long extended vacations away from the family home," would compound his fears and anxieties.

Reviewing the development of the father-son relationship with Thomas in July 1980, Dr. Perkins found the boy's attitude toward his father had changed substantially.

> He recalled seeing his father twice, once for ten days in July 1979 and once for two days in March 1980. * * * His father was still a stranger to him. [But * * * Tom no longer was neutral or passive in views of his father. He did not want to see his father again. He attributed to his father evil schemes of kidnapping him to Germany and generally expressed that his father had no real warmth or interest in him.

Dr. Perkins found that Peter Tischendorf's plans give very little recognition to Thomas' wants and that his insistence on the German visitation, knowing the child's expressed fears of traveling outside his home area, was insensitive to the child's current emotional and psychological state. In spite of this evidence, the trial court concluded: "It is impossible for

Thomas' father to re-establish a meaningful relationship with Thomas by brief visits to the United States. Unless there is an extended visit this year it is unlikely that the erosion in Thomas' perception of his father can be changed." The evidence before the court clearly shows that it is *more* unlikely that the erosion of Thomas' perception of his father will be changed if the visit to Germany is mandated. On the basis of a continuing professional relationship with Thomas and the opportunity to assess the effects of previous visitations with his father, Dr. Perkins concluded that only hostilities and resentment on the part of the child would result from such continued visitation practices.

In reaching a decision the court ignored not only weighty psychological evidence of harm to the child but also the court's own interview with Thomas, who indicated that he was afraid of going to Germany and did not want to go. The focus of a visitation determination must be what is best for the child. In making that determination, the child's fears, whether justified or not, should be given considerable weight, especially when presented in connection with uncontroverted testimony that visitation may be detrimental.

The majority finds that a 9-year-old boy lacks the ability to assess the value of building an enduring relationship with his father and perceives it in Thomas' best interests to be exposed to the family and culture of his German forebears and to take pride in his paternal roots. Nowhere is there evidence, however, that it is in Thomas' best interest to be so exposed at this time in his life when he is feeling threatened and fearful. Dr. Gilbertson expressed his concern at Thomas' nearness to adolescence and his need, more than ever, in that time "to experience the security of language, culture and a meaningful peer group to help articulate final social, emotional and sexual

skills." Any major disruption in Thomas' living relationship, Dr. Gilbertson emphasized, particularly a different culture, would, at this point, not be in Thomas' best interests psychologically or socially.

The North Dakota Supreme Court, in *Bergstrom v. Bergstrom*, 296 N.W.2d 490 (N.D. 1980), determined that the lower court erred in awarding exclusive custody of an 8-year-old girl to her mother who intended to reside in Norway. The court concluded that the trial judge had not given adequate weight to the child's wishes. The court reasoned that the child was of sufficient age and intelligence to make a rational choice as to her place of residence and that, in light of the child's preference, it was contrary to her best interests to compel her to reside with her mother in Norway. Though *Bergstrom* dealt with custody rather than visitation, the analysis of the *Bergstrom* court is equally applicable here. Both the psychologists' reports indicate that Thomas is a child of above-average intelligence who is capable of making rationale decisions. Given Thomas's strongly expressed preference and the uncontroverted reports of appellant's experts, the trial court's determination that visitation outside this country would be in the child's best interests is clearly erroneous.

Certainly a child should know his father and his roots, but this case assumes an unusually troubling aspect because of the evidence presented by Diane Montgomery that the Ramsey County decree giving custody of Thomas to his mother would not be recognized or enforced in West Germany in the event that Peter Tischendorf detains his son in Germany. Tischendorf has filed a written undertaking with the Ramsey County District Court that he will return the child on time and will not seek custody in any foreign court. That undertaking is not worth the proverbial paper it is written on if he changes

his mind, as the record indicates he has done on other occasions.[1] Nor is there anything the Ramsey County District Court or this court could do to help Diane Montgomery, an American citizen, retrieve custody of her son, who is also an American citizen.

The detailed exhibits before the court included (1) a copy of the voluminous West German court file which shows, among other items, that Diane was adjudged the sole "guilty party" in the German divorce; (2) the affidavit of Brigitta Bodenheimer, a United States law professor and attorney, licensed in both the United States and West Germany, and the United States delegate to the Hague Conference on International Child Abduction, which explains that under German law only Peter may petition for custody of the German child, Thomas, and that it is highly unlikely that a German court would recognize the Minnesota decree; (3) the letter from the German Consulate General that explains the difficulties of getting any foreign decrees recognized and the specific tests for recognition of a decree, none of which are satisfied by the Ramsey County decree; and (4) the letter from the Department of State detailing how that department has had to deal with

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[1] Peter Tischendorf has alleged that he does not have now and cannot obtain custody of Thomas under German law, while two experts in German law state that he can easily obtain custody. He has never presented any document to substantiate Diane's custody under German law. He informed the German court in his own divorce proceedings that Diane had abandoned him, that she had taken Thomas out of Germany without his permission and that he never planned to reside in the United States. He acknowledged to the Ramsey County District Court in May 1979 that he had considered moving to the United States, had looked for both a job and a house in Minnesota and that he had arranged for the travel of Diane and Thomas to the United States in 1974. When Diane and Thomas traveled to Germany to see him for 2 weeks in 1975, he sent them off to Spain for 10 days without him.

"parental kidnappers" and how very little it can do to effectuate the return of any American child detained in a foreign country.

My review of the record persuades me that Diane Montgomery is not seeking to deny Peter Tischendorf visitation with his son or the opportunity to develop a father-son relationship. The record shows that over the years she has sought to facilitate both. She seeks here only to restrict that visitation until Thomas desires it and until the courts of this state will make adequate provisions to insure that Peter Tischendorf will not remove or detain his son outside the United States as he threatened to do in 1976. In affirming the trial court's decision to permit Peter Tischendorf to visit his son in Germany for 3 weeks during the summer months, this court has done the very least it could do to insure Thomas' safe and timely return by increasing the letter of credit from $10,000 to a larger amount and by requiring Peter Tischendorf to furnish round-trip transportation for an adult companion to accompany Thomas to Germany and to obtain an order from an appropriate German court which will recognize the exclusive jurisdiction of American courts for determining Thomas' custody and which acknowledges the duty of German courts to enforce appellant's right to custody, subject to respondent's stipulated right of visitation.

For my part, if we must face the constitutional issue, I agree with Justice Yetka that Thomas possesses a constitutional right not to be compelled to leave the territory of the United States. The record discloses that it has been demonstrated that Thomas can intelligently exercise that right and that he has, in fact, intelligently exercised his right to remain in this country.

I would reverse.

APPENDIX B

STATE OF MINNESOTA — DISTRICT COURT
County of Ramsey — Second Judicial District

File No. 414662

DIANE TISCHENDORF,

Petitioner,

vs.

PETER TISCHENDORF,

Respondent.

ORDER DENYING MOTION FOR APPOINTMENT AS GUARDIAN AD LITEM AND FOR LEAVE TO INTERVENE.

This matter was heard July 14, 1980, and July 24, 1980, upon petitioner's motion for an order denying visitation with the minor son of the parties, "especially visitation outside the continental United States", until certain conditions are met. The conditions are set out in the motion, dated July 8, 1980.

Petitioner appeared by her counsel, Thomas Kane and Catherine Cella. Respondent appeared by his counsel, James H. Hennessy. Petitioner Diane Tischendorf Montgomery was present.

Upon the arguments of counsel, the evidence previously adduced at trial, the court's interviews with the child of the parties, and all the files, records, and proceedings, it is ORDERED that:

1. Petitioner's motions be denied.

2. Petitioner deliver Thomas Tischendorf, minor child of the parties, to an associate of counsel for respondent prepared for a three-week stay in Germany, at her home, at or before 12:00 noon, on August 1, 1980.

2. Thomas Tischendorf be accompanied to Chicago by an associate of counsel for respondent, through his change to a Lufthansa flight to Frankfurt, Germany.

3. Respondent pick up Thomas at the Frankfurt airport when the flight arrives on August 2.

4. Respondent comply with the itinerary on file with the court.

5. On August 22, 1980, respondent place Thomas on Lufthansa flight 430 at the Frankfurt airport, with connections at Chicago to NWA flight 707 to Minneapolis, so that Thomas will be on the ground in Minneapolis on August 22, 1980.

6. Violation of this order is a contempt of court.

7. Service by the court of this order upon counsel is due and proper service for all purposes.

8. The attached memorandum is part of this order.

/s/ JOSEPH P. SUMMERS
Judge of District Court

DATED: This 25 day of July, 1980

MEMORANDUM

Petitioner and respondent were married September 8, 1968, and soon thereafter moved to Hamburg, Federal Republic of Germany. Respondent is a German national.

Thomas Tischendorf, the parties' only child, was born in Germany on December 25, 1970.

In August, 1974, petitioner and the child came back to Minnesota.

On May 17, 1977, petitioner obtained a default divorce in Ramsey County. The decree forbids respondent from "contacting, seeing, or visiting with the minor child of the parties".

On March 23, 1979, respondent moved this court for an order amending the decree to permit him to visit his son;

specifically, respondent wanted Thomas to visit with him in Germany in 1979.

After trial in May, 1979, the court determined that it would not be wise for Thomas to go to Germany in 1979, but that it would be in his best interests to go in 1980.

Accordingly, the court ordered that the default decree obtained by petitioner on May 17, 1977, be amended to allow respondent to have contact and visitation with his child in the United States first, and then in Germany in 1980.

Petitioner then fired her lawyer and hired her present counsel.

New counsel moved the court to reconsider its order allowing respondent to have visitation with his child in the United States and Germany. The motion was denied.

Respondent complied with the requirements which the court made conditions precedent to his visiting the child in Germany this year. He has filed a written undertaking that he will return the child on time and will not seek custody in any foreign court. He filed the $10,000 irrevocable letter of credit payable to petitioner to secure these undertakings, as required by this court. The court believes, on the basis of respondent's demeanor, his personal situation, and all the evidence that he will return the child.

After the entry of judgment providing for visitation, there was a meeting of petitioner, respondent, and their counsel in Minneapolis on March 17, 1980.

At this meeting a stipulation was formally executed and is on file with the court. The stipulation reads, in relevant part, as follows:

> "b. Summer, 1980, respondent shall have visitation in Germany for a period of twenty-two (22) days which shall be exercised at a time selected commencing during

the period of the last week of July, July 28, 1980, through the first week in September, 1980."

The stipulation lays down additional requirements which respondent must meet as preparation for visitation.

Pursuant to stipulation respondent, through his counsel, has provided petitioner with his proposed itinerary for Thomas' visit to Germany this year. The itinerary contemplates that Thomas leave Minneapolis for Germany on August 1, 1980, and return August 22, 1980.

To get the itinerary worked out far enough in advance to permit visitation in accordance with the stipulation to which petitioner and her counsel had agreed, the court met informally with counsel in chambers on June 13, 1980. At that meeting the court indicated that it would hear any objections to the proposed itinerary on July 14, 1980. It then issued an order *sua sponte* indicating the itinerary would stand approved unless modified July 14, 1980.

Since the motion now before the court does not make any suggestions for change in the proposed itinerary, the itinerary stands approved.

The instant motion requests the court to impose additional requirements upon respondent as a condition of his visiting Thomas in Germany next week. These matters were fully litigated over a year ago. The court is satisfied that Dr. Tischendorf will return Thomas to the U. S. A. at the end of August and that no further security is required. That portion of the motion is therefore denied.

The motion also asks the court to deny respondent the right to visit his child in Germany until he has settled his financial aspects of his divorce case with petitioner. The use of children as bargaining counters to extract financial concessions in a dissolution action is contrary to public policy and that portion of the motion is also denied.

The motion finally asks the court to deny visitation outside the United States until young Thomas himself agrees to it.

It is impossible for Thomas' father to re-establish a meaningful relationship with Thomas by brief visits in the United States. Unless there is an extended visit this year it is unlikely that the erosion in Thomas' perception of his father can be checked.

The court is aware that Thomas does not feel like going to Germany this year. However, it often occurs in the lives of parents and the courts that children do not want to do what is deemed best for them. Thomas' real fear is not of *visiting* Germany but of being *detained* in Germany. This is a genuine fear, and the court is concerned about it. The court believes, however, that he will be returned safely to the U. S. and will be better for the experience.

J.P.S.

APPENDIX C

STATE OF MINNESOTA — DISTRICT COURT
County of Ramsey — Second Judicial District

File No. 414662

In Re the Marriage of:
DIANE TISCHENDORF,

Petitioner,

and

PETER TISCHENDORF,

Respondent.

ORDER

The court met informally in chambers on June 13, 1980, with Thomas P. Kane, attorney for petitioner, and James H.

Hennessy, attorney for respondent, to discuss respondent's projected visitation in Germany with Thomas Tischendorf from August 1, 1980 to August 22, 1980.

The court expressed its concern that all matters in issue between the parties be resolved well in advance of Thomas' projected departure.

After discussion it is ORDERED that:

1. Any motion of petitioner for an order amending the itinerary filed with the clerk on May 8, 1980, must be served in accordance with the Minnesota Rules of Civil Procedure and set for hearing before the undersigned on July 14, 1980, at 1:30 p.m. in Chambers 1109 of the Ramsey County Court House.

2. Unless otherwise ordered by the court after hearing on a motion served as aforesaid, the itinerary described above is hereby deemed to be in compliance with the amended judgment and decree filed herein December 26, 1979, and respondent is ordered to turn over the child, Thomas Tischendorf, to an attorney from the office of counsel for respondent at her home no earlier than 12:00 noon nor later than 1:00 p.m. on Friday, August 1, 1980, for transportation to the Minneapolis-St. Paul International Airport (Wold-Chamberlain Field) in accordance with the itinerary.

3. Violation of this order by either party shall be a contempt of court and punishable accordingly.

4. Service of a copy of this order upon counsel by mail shall be deemed due and proper service upon each party for all purposes.

JOSEPH P. SUMMERS
Judge of District Court

DATED: This 13th day of June, 1980.

APPENDIX D

STATE OF MINNESOTA DISTRICT COURT
County of Ramsey Second Judicial District

File No. 414662

DIANE TISCHENDORF,

Petitioner,

vs.

PETER TISCHENDORF,

Respondent.

ORDER

This matter came on for hearing May 1, 1979, pursuant to the motion of respondent served March 31, 1979, on file with the court.

Petitioner appeared in person and was represented by her attorneys, Lindsay G. Arthur, Jr., Esq., and Denis E. Grande, Esq.

Respondent appeared in person and was represented by his attorney, James H. Hennessy, Esq.

Testimony was taken and the matter submitted to the Court upon the record.

Upon the evidence adduced at hearing, and upon the files, records, and proceedings herein, it is ORDERED that

I.

Paragraphs 3, 4, 5, 6, and 7 of the Judgment and Decree entered May 17, 1977, be vacated, and the following inserted in lieu thereof:

3. Respondent shall have the right of reasonable visitation with the minor child within the state of Minnesota, upon 24 hours' notice to petitioner.

Respondent shall have the right of reasonable visitation with the minor child outside the state of Minnesota but within the limits of the continental United States, upon two weeks' notice to petitioner and upon petitioner's express written consent, which consent shall not be unreasonably withheld.

Respondent shall have the right each year to an extended period of visitation with the minor child, of no more than two weeks duration, during school vacation periods, within the continental United States.

Commencing with the summer of 1980, respondent shall have the right each summer to a period of visitation with the minor child in the Federal Republic of Germany of no more than 22 days' duration between departure from Minneapolis to return to Minneapolis, unless otherwise ordered by the court for good cause shown.

Respondent shall pay all expenses of visitation and shall, with respect to visitation outside the state of Minnesota, provide to petitioner a written itinerary and keep petitioner advised of the whereabouts of himself and the minor child."

"4. Respondent shall pay to petitioner as child support the sum of $250 per month or its equivalent in Deutschmarks, payable on the first day of each month, commencing June 1, 1979, and continuing until the child is no longer a dependent minor."

"5. Neither party is awarded spousal maintenance, each being self-supporting."

"6. Each party is awarded all personal property in his or her possession."

"7. The court expressly reserves jurisdiction over real property of the parties."

II.

Between today and respondent's departure for Germany on May 6, petitioner shall make the minor child available to respondent for visitation outside the home and presence of petitioner but within the Twin Cities metropolitan area, including at least one overnight visitation. Such visitation may be conducted in the company of Mr. or Mrs. Wright W. Brooks and overnight visitation shall be at their home.

III.

No judgment shall be entered under Part I of this order, and such part shall be ineffective, until respondent files with this court, in form acceptable to the court and counsel, the attached agreement, fully executed, and a letter of credit drawn on a Minnesota correspondent bank, or a corporate surety bond, in the face amount of $10,000, payable to petitioner and conditioned as follows:

A. That the issuer shall pay to petitioner or her assigns the full face amount if respondent fails to abide by any condition of the attached agreement;

B. That the issuer subjects itself to the jurisdiction of the District Court of Minnesota in all matters arising out of its undertaking and accepts service of all process by first-class mail;

C. That the issuer will maintain the letter of credit or bond in effect until January 1, 1984.

Any motion to amend or enforce the foregoing order or any judgment and decree entered in accordance therewith shall be brought before the undersigned.

LET JUDGMENT BE ENTERED ACCORDINGLY.

JOSEPH P. SUMMERS
Judge of District Court

DATED: This 3rd day of May, 1979.

APPENDIX E

STATE OF MINNESOTA — DISTRICT COURT
County of Ramsey — Second Judicial District

File No. 414662

DIANE TISCHENDORF,

Petitioner,

vs.

PETER TISCHENDORF,

Respondent.

NOTICE OF MOTION AND MOTION

TO: Respondent Peter Tischendorf and your attorney James Hennessy, Barnett, Ratelle, Hennessy, Vander Vort, Stasel & Herzog, 4624 IDS Center, Minneapolis, Minnesota

NOTICE OF MOTION

PLEASE TAKE NOTICE that on Monday, the 14th day of July, 1980, before the Honorable Joseph Summers, in Room 1109 of the Ramsey County Courthouse, City of St. Paul, State of Minnesota, at 1:30 p.m. or as soon thereafter as counsel may be heard counsel for Petitioner will move the Court for an Order denying Respondent further visitation with the parties' son, especially visitation outside the continental United States until specific measures have been implemented to protect the child from being involuntarily detained outside the United States.

MOTION

Petitioner respectfully moves this Court for an Order specifically denying Respondent his proposed visitation with the parties' minor son in West Germany during August, 1980 and suspending all further visitation until specific, detailed

measures have been implemented to protect the child from being involuntarily removed or detained outside the United States. These measures include but are not limited to: 1) requiring Respondent to cause the appropriate German courts to enter an appropriate non-appealable order

(a) recognizing that Petitioner has permanent custody of the child under German law and that the child is an United States citizen;

(b) recognizing that the Minnesota courts have exclusive jurisdiction over all custody and visitation issues between Petitioner and Respondent;

(c) providing that the proper German authorities will enforce Petitioner's rights;

(d) amending, if necessary, Respondent's German divorce decree so that it is not inconsistent with the provisions of this Order;

(e) requiring the execution of a legally valid stipulation by Respondent in Germany in the German language in which he waives custody, submits to the jurisdiction of the Minnesota courts on custody and visitation and agrees to return the child to the United States after visitation, such stipulation to be filed with the German court and incorporated in the Order;

(f) such other matters as German counsel for Petitioner may reasonably require.

Respondent must file with this court properly exemplified and authenticated copies of said order and all other matters in Respondent's court file in Germany. Said order must be affirmed by this court, United States counsel for Petitioner and Petitioner's German counsel.

2) Settlement of all outstanding financial claims prior to visitation so that Respondent's incentives to detain the child outside the United States are reduced.

3) Limiting visitation to the United States until the child himself agrees to visitation outside the United States.

This motion is based upon the attached memorandum of law and the exhibits and affidavits attached thereto and the entire file and proceedings herein.

OPPENHEIMER, WOLFF,
FOSTER, SHEPARD AND
DONNELLY
By THOMAS P. KANE
CATHERINE A. CELLA
Attorneys for Petitioner
4824 IDS Center
Minneapolis, Minnesota 55402
Telephone: 332-6451

Dated: July 8, 1980

STATE OF MINNESOTA
County of Ramsey

DISTRICT COURT
Second Judicial District

File No. 414662

DIANE TISCHENDORF,

Petitioner,

vs.

PETER TISCHENDORF,

Respondent.

MEMORANDUM IN SUPPORT OF MOTION

This motion, to suspend Respondent's visitation rights, especially his rights to visitation outside the United States, until specific protective measures, designed to safeguard the child from being unwillingly detained outside the United

States, are implemented, is brought at the request of this Court by Order dated June 13, 1980.

STATEMENT OF FACTS

Most of the facts of this case are well known to this Court. The following brief outline of facts highlights those facts most important to the consideration of this motion.

Petitioner, a citizen of the United States of America, and Respondent, a citizen of the Federal Republic of Germany, were married in Minneapolis, Minnesota September 8, 1968. The couple lived in Chicago, and then in Hamburg, West Germany where their child, Thomas, was born in December, 1970. In August, 1974 Petitioner and the child came to Minnesota to enable Petitioner to finish her interrupted graduate studies and to resettle in the United States, with the understanding that Respondent would follow within the year. Respondent came to Minneapolis during the 1974 Christmas holidays. While in Minneapolis he engaged a realtor, he and Petitioner looked for houses and he had interviews for various positions in hospitals and private practices. However, Respondent continually put off moving to the United States and the parties' marriage relationship deteriorated during the time they lived in separate countries.

In May 1976, the Respondent petitioned the German court for a divorce citing desertion and snatching the minor child by the Petitioner as grounds for the divorce. The Petitioner on the advice of both American and German counsel filed a divorce petition in the United States, in Ramsey County, Minnesota. At the German divorce hearing the German Court took note of the American divorce proceeding but denied its jurisdiction and rendered an order on March 11, 1977, granting the divorce and implicitly giving custody of Thomas to the Respondent. Pursuant to Minnesota law, the Respondent

was personally served with the American divorce papers. The American action was uncontested and the court issued its order on May 17, 1977. This order granted the Petitioner a divorce and exclusive custody of the child. Further, as the Respondent had verbally and in writing threatened to take the child back to the jurisdiction of the German court, a restraining order was included in the decree.

For over two years Respondent made no efforts to answer the repeated requests of his ex-wife and her family to come to the United States, submit to jurisdiction of the American courts, settle past and future financial issues involving the child and set up a secure visitation scheme by which the child could develop a relationship with his natural father and both the child and Petitioner could be assured that Respondent could not forcibly remove the child to Germany.

In March of 1979, the Respondent petitioned the Minnesota court for modification of all major points of the American divorce and custody order. In May 1979 the Ramsey County Court entered an order relating only to the visitation and current support issues. This Order allowed the Respondent open visitation in the United States and specifically ordered the child to spend 22 days on a trip to Germany in the summer of 1980. A letter of credit in the sum of $10,000 which has not yet been approved by Petitioner's counsel was required of the Respondent as a condition to any visitation. As a further condition the court required the Respondent to sign an agreement in which he admitted to the court that he recognized the United States custody order.

In a letter dated May 5, 1980 Respondent requested that the child be put on a plane for Germany on August 1, 1980. On June 13, 1980 the Ramsey County court ordered that the father's request be honored.

ARGUMENT

I. IT IS IN THE BEST INTEREST OF THOMAS TISCHENDORF THAT ANY FURTHER VISITATION WITH HIS FATHER, ESPECIALLY VISITATION OUTSIDE THE UNITED STATES BE SUSPENDED UNTIL SPECIFIC MEASURES, DESIGNED TO PROTECT THE CHILD FROM BEING UNWILLINGLY DETAINED OUTSIDE THE UNITED STATES, BE IMPLEMENTED.

A. There Is Presently No International Agreement That Recognizes And Enforces Foreign Custody Decrees.

Within the United States custody and visitation decrees issued by one state are recognized and enforced in other states pursuant to the Uniform Child Custody Jurisdiction Act.

The Uniform Child Custody Jurisdiction Act was adopted by the Commission on Uniform Laws in recognition that a serious problem existed because many states did not recognize the custody decrees of other states. As a result of this children were being shifted from state to state by parents seeking favorable custody orders. Even good intentioned and otherwise law abiding parents "kidnapped" their children for such purposes. Such activity had a lasting detrimental effect on the children who were victims of such practices. See Commissioners' Prefactory Note to the Uniform Child Custody Jurisdiction Act as quoted by the Minnesota Supreme Court in *Petition of Giblin*, 304 Minn. 510, 232 N.W.2d 214 (1975). The Minnesota Legislature adopted the Uniform Child Custody Jurisdiction Act in 1977 specifically to curb the above described abuses. Minn. Stat. §518.01, subd. 1. As of 1980, 43 other states have also passed this Uniform Act for similar reasons. With few exceptions the 50 states comprising the United States have a common culture, language and case law regarding family law matters.

Outside the United States, however, there exist many diverse law systems, languages, family traditions, and cultural values. The importance of protecting local citizens and jealous attitudes toward independent jurisdiction in the sensitive area of family law have hampered development of an "international" family law. Due to the absence of a network of international treaties dealing with international child custody disputes and the predilection of national courts to give preference to their own citizens, most countries do not have procedures under which valid custody orders from other countries can be recognized and enforced.

The same problem, therefore, that existed between different states in the United States prior to the adoption of the Uniform Act still exists between different countries. In such situations, the fact that one parent is a citizen of one country, the other a citizen of another country, the child may have a dual-nationality, and that conflicting court decrees may exist in different languages arising out of different legal systems, only intensifies and exacerbates the problems which the Commissioners on Uniform Laws sought to solve in adopting the Uniform Child Custody Jurisdiction Act.

The problem of international custody disputes is real and is recognized by the interrational community. The Hague Conference on Private International Law is currently in the process of addressing this issue. As part of its proceedings, officials of the Conference have received official statements from 18 participating governments, including the United States, West Germany, and most of the Western European countries outlining the extent of the problem and attitudes of the legal authorities in each of the respective countries.

On November 16, 1979, the Conference adopted a "Preliminary Draft Convention on the Civil Aspects of Interna-

tional Child Abduction". Although it is hoped that once the work of the Hague Conference is completed, the problem of recognizing and enforcing foreign custody orders will be alleviated, as it has in the United States with the Uniform Act, it is anticipated to be years before the Convention is ratified. (See Exhibit B, affidavit of Prof. Brigitte M. Bodenheimer, Chief U. S. delegate to the Hague Conference.) Until this happens, there is no adequate protection, no remedy and no recourse under international law for children illegally taken to or retained in a foreign country.

This fact is made abundantly clear by the experience of the Office of Citizens Consular Services, U.S. State Department. According to information provided by the State Department (Exhibit C) the Department currently has in its files approximately 1800 cases involving American parents whose children have been reported wrongfully taken to or detained in a foreign country by the non-custodial parent. The State Department estimates that several times this number have never been reported. The number of these cases also has been increasing annually. The State Department can only help the American parent locate the child, monitor the child's welfare, and provide to the American parent a list of attorneys in the foreign country. There is nothing, however, that the United States government can do to force a foreign government to honor any U.S. court order regarding custody or visitation. There is nothing that U.S. consular officials can do to mitigate a foreign legal action. The only remedy a U.S. citizen has is to obtain recognition and then enforcement of a U.S. court order regarding custody and visitation rights and this must be done in the local courts of the foreign country. (Exhibits B, C pp. 5-6 and N)

B. The Custody And Visitation Order Of This Court Will Not Be Recognized By The German Courts.

The Tischendorf v. Tischendorf case involves jurisdictional conflicts between the United States and the Federal Republic of Germany. The Respondent in this case commenced his action in West Germany in May, 1976 and was granted a divorce by decree dated February 2, 1977. (Exhibit D, this is a translation of the German Court file and is more complete and accurate than the decree and translation offered by Respondent at the May, 1979 hearing). Petitioner commenced her case in this court in September, 1976 and was granted a divorce by decree dated May 17, 1977 which also granted her exclusive custody of the child. (Exhibit E).

The German court ruled that the Petitioner bore the sole guilt for the breakdown of the Tischendorf marriage. This was based on Peter Tischendorf's testimony that his wife deserted him and was thereby disloyal, further that she absconded with the child and refused to return to German jurisdiction. Under section 1671 of the German Civil Code, the non-guilty party, in this case the Respondent, automatically receives exclusive custody of any minors from the German Family Courts. (Exhibit B p. 4). Furthermore, as noted by the German court, Exhibit D pp. 11-12) the German petition predated the American decree by several months and pursuant to Section 606 of the German Code of Civil Procedure the German Court claimed to have exclusive jurisdiction over this case. (See also Exhibit B p. 5). The German divorce action therefore resulted in issuance of a German decree which claimed exclusive jurisdiction over the U.S. decree and specifically granted the divorce and custody to the Respondent.

Although German courts, in principle, may recognize foreign judgments under appropriate circumstances, recognition

and enforcement of foreign decrees are not automatic and there are several statutory exceptions expressly forbidding such recognition. These exceptions are set forth in Section 328 of the German Code of Civil Procedure. (Exhibit F, letter from German Consulate General in Chicago.) and include:

1. The courts in the foreign country do not have jurisdiction pursuant to German law.

2. Inadequate service of process under German law of the foreign action on the defendant German party.

3. The recognition of such judgment offends the morals or purposes of German law.

4. Reciprocity is not guaranteed.

All four of the above exceptions clearly apply to the American divorce and custody order in this case. Recognition and enforcement of this order under current German laws would be unlikely.

1. Under German law, the German courts claim exclusive jurisdiction over this matter. (Exhibit B p. 5, Exhibit D pp. 11-12). The German court therefore would have to formally give up its jurisdiction to recognize the Ramsey County court orders.

2. Service of the German divorce action was made on the Petitioner perhaps pursuant to German law, but the American papers were served as prescribed by Minnesota law. The two service procedures are not identical and the German service was made several months prior to the American service, rendering the American service ineffectual under German law.

3. Since Petitioner was found to bear the sole "guilt" for the marriage dissolution, the German divorce decree does give custody of the child to the Respondent pursuant to German law. (Exhibit B, p. 4). Any recognition of the Ramsey County decree would therefore be contrary to the purposes of German law.

4. American reciprocity is not guaranteed. There are no applicable treaties between the United States and West Germany and no provision in Minnesota law guaranteeing the recognition of a German custody order.

There exist then, two strongly conflicting custody decisions, one in the United States and one in Germany. Further, since Western European countries, such as the British Commonwealth and the French Overseas Community, do have reciprocity with Germany in family law issues, the German decree would have precedent over the American decree in these countries as well. Under German law the German decision takes precedence over the American decision and the German courts will not recognize or enforce the American order. Prof. Bodenheimer has rendered her opinion that the Ramsey County custody order would not be recognized or enforceable in the German courts. Judge Summers in the May 1979 hearing also impliedly recognized this to be true. He required the Respondent to sign an agreement in which he would recognize the U.S. custody order of May 1979 and post a letter of credit with the court. Unfortunately as Prof. Bodenheimer, the State Department and U.S. Embassy's legal counsel to Germany recognize, this agreement is binding only within the jurisdiction of the Ramsey County court and other U.S. courts. A German court is not bound by this, nor is Respondent once he is outside the United States.

Furthermore, the $10,000 letter of credit will not ensure that Respondent does not detain the child in Germany. In the view of the State Department Passport Office, Office of Consular Service and Prof. Bodenheimer, the letter of credit is a useless deterrent unless the sum is so large that it financially paralyzes the parental kidnapper. To many parents the price of kidnapping or the legal costs in getting the child back are secondary in consideration. The letter of credit is an in-

effectual means of offering protective relief to the U.S. parent.

C. To Send The Child To Germany Without Additional Protection For His Safety Is A Denial Of The Child's Right To The Protection Of The Constitution And Laws Of The United States.

In adopting the Uniform Child Custody Jurisdiction Act, the Minnesota legislature acknowledged the wisdom of uniform enforcement in different state jurisdictions of child custody decrees, the avoidance of jurisdictional competition and relitigation, and the deterrence of abductions of children. Now, a Minnesota family court has substantial assurance that its orders will be appropriately recognized and enforced, throughout most of the United States. This offers protection to citizens of Minnesota, both adult and minor, who are involved in child custody litigation within the United States. If however, a Minnesota family court knows that a child will be taken for visitation to a jurisdiction where there is no such assurance of recognition or enforcement of its order, it is incumbent upon the Minnesota court to provide additional protection and relief to the Minnesota parent and minor. Not to afford such protection to the Minnesota citizens is to leave them and their rights at the mercy of other jurisdictions.

If a Minnesota family court should not only not offer such additional protection to a child but further order the removal of the child, who is a citizen of the United States, to a foreign country, even for a temporary visit, and, thus by its order, place the child beyond the protection of the Minnesota court and the Constitution and laws of the United States, a constitutional question is raised. This constitutional issue has been recently litigated before Judge Van Sickle of the U.S. District Court for North Dakota in *Bergstrom v. Bergstrom*,

478 F.Supp 434 (N.D. 1979). In that case the court recognized that an 8 year-old child in a custody proceeding had an independent right to decide whether she wanted to return to Norway with her mother, a Norwegian citizen. The court specifically found that:

a. Under American law the child in question was a U.S. citizen.

b. As a U.S. citizen, the child, if present in a foreign country, could not be afforded the basic rights guaranteed by the Constitution to every American citizen residing in the United States.

c. At the age of 8 years and 10 months the child was of sufficient age, discretion and intelligence to exercise intelligent preference apart from the preference of either of her parents, the child's preference in this case being to remain in the United States and not return to a foreign country.

d. The child's minority had no effect on her legal capacity to exercise her rights as a U.S. citizen under the Constitution.

e. The court had been shown no laws, statutes, or holding which would authorize a court of domestic relations to remove a minor American citizen from the protection of the Constitution and laws of the United States.

By Order, dated June 13, 1980, this Court requires that Thomas Tischendorf be handed over August 1, 1980 to counsel for Respondent for transportation to West Germany, a country where this court has no jurisdiction. There the child is to be handed over to a parent who is legally the custodial parent under both West German law and under a valid West German divorce decree which is completely contrary to this court's order and which by its own statement does not give effect to

this court's order. The child, who is 9-1/2 years old, has repeatedly said that he does not want to go to West Germany. The child has said this to the Ramsey County Judge, to independent child psychologists, to counsel, to his parents, to his grandparents and repeatedly to his father verbally and in writing. For four recent discussions and examples of the child's wishes and feelings see Exhibit G. (An affidavit from a child psychologist who met with the child on July 3, 1980 for over five hours) H (an affidavit from the psychologist who has seen the child continually for the past several years, I (transcript of a discussion on July 7, 1980 between the child and Thomas Kane, counsel for Petitioner) and J (letter from the child to his father in early May 1980).

The child is an American citizen. In Germany, however short his initial intended stay, he clearly will be deprived of the protection of the Constitution and laws of the United States and the orders of the American court. The child has made his clear, independent, and intelligent decision that he does not want to go to Germany. For this court to require the enforcement of its current order would be a clear violation of the child's rights under the 14th Amendment to the Constitution of the United States.[1]

D. Minnesota Law Requires This Court To Modify Its Present Visitation Orders To Preclude Visitation Until Adequate Measures Are Instituted To Protect The Childs Safety.

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[1] The 8th Circuit Court of Appeals considered the *Bergstrom* case and in an opinion dated June 13, 1980, raised *sua sponte* the issue that the constitutional question was not ripe for decision because the custody issue was currently being relitigated in the North Dakota state courts. Unlike the *Bergstrom* case, however, the constitutional issue in the case before this court is most ripe for decision. The child, by order of this court, is to be removed from the United States in less than 3 weeks.

A relatively new law, Minn. Stat. §518.175 provides for visitation rights of a non-custodial parent and also sets out crieteria for modifying such rights:

> The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child, but the court shall not restrict a parent's visitation rights unless it finds that the visitation is likely to endanger the child's physical or emotional health or impair his emotional development. Minn. Stat. §518.175, subd. 5 (1978).

In a Minnesota case decided under this law, the court stated that this provision embodies the policy the Minnesota courts have always followed with regard to visitation by a non-custodial parent: " . . . that visitation is to be regarded as a parental right essential to the continuance and maintenance of the child-to-parent relationship between the child and the non-custodial parent, and that a denial of this right shall be based on persuasive evidence that visitation will not serve the best interests of the child." *Griffin v. VanGriffin*, 267 N.W.2d 733, 735 (Minn. 1978).

The court in *Griffin* went on to uphold the family court judge's denial of the father's motion to reestablish visitation rights with his son citing the following factors: The father contributed little or nothing to the support of his family; the father had had no contact with his son for four years prior to the family court hearing; the child's mother had remarried two years before the court hearing and the child had been living with his mother and stepfather since then; the stepfather was the only father the child remembered; and the child did not desire visitation. The family court judge found that visitation by the father would be "likely to disrupt the only family harmony and security the child had known." 267 N.W. 2nd 735.

The *Griffin* case is similar to the instant case. Before visitation privileges were reinstituted in May of 1979, Respondent had not seen his son (with the exception of a brief visit during December 1978) for several years. Petitioner had remarried before the May 1979 hearing and the child has been living with his mother and stepfather ever since. The stepfather is very close to the child; the child calls him "dad" and thinks of him as his dad. The child does not desire visitation outside the United States. (Exhibits G, H, I and J) Although unlike the father in the *Griffin* case, Respondent has provided support for his son, this case has complicating factors the *Griffin* case does not.

Petitioner in this case does not seek to totally deny Respondent's visitation with his son, she only seeks to restrict his visitation until adequate provisions can be made to ensure that the Respondent will not remove or detain the boy outside of the United States. In this case the court is dealing not with two U.S. parents but parents of two different countries and this court can not be assured that its orders will be recognized or enforced in Respondent's country. The child in this case faces the very real possibility that he may be kept, against his will, in a foreign country. If that happens under present circumstances, there is little, if anything, his mother can do to get him back. These circumstances are clearly not in the best interests of the child and further visitation under these circumstances is also not the child's best interest. Further visitation should therefore be suspended until these circumstances can be changed.

This predicament actually presents two issues for the court's consideration: Is Respondent likely to unlawfully keep the boy in Germany? and if he does so, will Petitioner be able to get him back? Apparently because this Court believes the answer to the first question is "No", the second question need not even be considered.

Petitioner believes the Respondent may very well keep the boy in Germany. She bases her belief on the Respondent's own words. Respondent stated to this court last May that he would return the boy to his mother after any visitation in Germany (Tr. of May 1, 1979, hearing p. 143). However since that time Respondent has talked to his son several times about coming to live in Germany and going to German schools. (Exhibit G, I, K) Respondent also told Petitioner in March of this year that his parents wanted Thomas to live in Germany and would make it financially worth Respondent's while to accomplish such a thing. (Exhibit K).

Respondent's credibility in other areas has also not been very good.

At that same May, 1979 hearing Respondent stated that no disposition was made relative to the custody of Thomas in the German divorce hearing and that he did not attempt to get custody of Thomas through the German courts. (Tr. p. 16, 31) At the time of the May hearing Respondent already had custody of Thomas under German law. (See Exhibit B) Also at the May, 1979 hearing Respondent admitted that he and Petitioner discussed settling in the United States and as late as Christmas of 1974 they looked for houses and Respondent interviewed for jobs in the Twin Cities area. (Tr. 83-88). In his testimony before the German court Respondent stated that Petitioner has left him for good in August 1974 and he never had any intention of moving to the United States (Exhibit D).

Further, Respondent's credibility, reliability and sensitivity to the emotional needs of his son have been cast into serious doubt by Respondent's actions during his previous visitations (See Exhibit K for a more detailed explanation of recent visitation problems). Respondent would rather talk to his attorney and the Court about visitation than discuss the issue with his son and his mother (Exhibit L and M).

All this forces Petitioner to face the frightening prospect that Respondent may plan to take his son to Germany, permanently. Even if the Court does not share Petitioner's belief, the Court should require some additional safeguards be put into effect before current or future visitation takes place. For if the Court is wrong and Petitioner is right, there is nothing the Court can do to remedy the situation after the fact. Petitioner is not asking the Court to totally deny Respondent the right to visitation, Petitioner is asking merely that the Court act now to protect her rights and the rights of the child from possible abrogation. No one can predict whether Respondent will honor the custody decree of this Court, but this Court can do something to make such a prediction unnecessary. The best interests of Thomas Tischendorf are served by affirmatively acting to protect him now, rather than apologizing for not acting when its too late.

II. PROPOSED ADDITIONAL SAFEGUARDS

Other courts in the United States, when faced with similar issues, have granted certain protective relief because of the international problems. In *Davidyan v. Davidyan*, 229 Pa. Super 495, 327 A. 2d 139 (1974), the court required that before the mother, a citizen of Scotland, could take the child to Scotland for the school year, she must post a bond and must submit evidence from a court of competent jurisdiction in Scotland that the Scottish court would recognize the retention of jurisdiction over the cause and the parties by the Pennsylvania court. In *Levicky v. Levicky*, 140 A. 2d 534, 19 N.J. Super 562 (1958), the court, faced with conflicting decrees in the state of New Jersey and in France, would not let the child travel from New Jersey to France until the French spouse had obtained an exemplified copy of a decree or judgment of the Civil Tribunal of Nantes, Republic of France, together with exemplified copies of all supporting pleadings and

other papers on file, modifying the original decree of the French court to include the terms of the New Jersey decree and to accord recognition to the New Jersey decree. The Court in *Milne v. Goldstein*, 20 Cal Rptr. 903 (1962), was also faced with a conflicting decree situation between California and the court in the then Union of South Africa and required the South African spouse to deposit securities worth $175,000 and obtain an appropriate modification of the South African decree.

People with experience in international custody situations state that the only way to protect the American child from removal to or detention in a foreign country is to require the foreign spouse to obtain an order or pronouncement from the appropriate foreign court which recognizes the American parent's right to custody, the limited nature of the foreign parent's visitation rights and states that the foreign court will enforce the American parents rights to custody and order the return of the child to America, if necessary. (See Exhibits B, C and N.)

Petitioner asks that this Court require Repsondent to obtain such an order from the appropriate German Court and file it with this court before any further visitation be permitted. Petitioner also asks that this Court limit Respondent's visitation to the United States until the child agrees to go to Germany.

Dated: ————

Respectively submitted,
OPPENHEIMER, WOLFF,
FOSTER, SHEPARD AND
DONNELLY
By THOMAS P. KANE
CATHERINE A. CELLA
Attorneys for Petitioner

APPENDIX F
IN THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT
COUNTY OF RAMSEY, MINNESOTA

File No. 414662

IN RE THE MARRIAGE OF
DIANE TISCHENDORF,

Petitioner,

and

PETER TISCHENDORF,

Respondent.

AFFIDAVIT

I. Brigitte M. Bodenheimer, being duly sworn, depose and state:

I. Qualifications

I am a professor of Law at the University of California at Davis. I have taught Family Law for many years and specialize in Child Custody Law. Although now in emeritus status, I continue to supervise students and am actively engaged in research and writing on interstate and international child custody law.

I studied law in Germany and obtained the degree of Doctor Juris from the University of Heidelberg. Subsequently, I attended law school in the United States. I hold an LL.B. degree from the University of Washington and am admitted to practice in the states of Washington and Utah. I am a member of the International Society of Family Law and of the Family Law Section of the American Bar Association.

Since 1978 I have served, under State Department assignment, as the principal United States delegate to the Hague

Conference on Private International Law which is preparing a multi-national convention on the Civil Aspects of International Child Abduction. Earlier, I served as Reporter for the Commissioners on Uniform State Laws. In this capacity, I drafted the Uniform Child Custody Jurisdiction Act which has since been adopted by 44 states.

I am in frequent communication with Family Law scholars in Germany and keep informed about developments in German divorce and custody law. As United States delegate to the Hague Conference, I spent 24 days last year at the Hague in working sessions with European judges, scholars, and government officials who are experts on child custody law, including experts from Germany.

II. Prior Proceedings in the Instant Case

1. I understand that petitioner Diane Tischendorf was awarded custody of the parties' son in 1977 in divorce proceedings in this Court.

2. I also understand that respondent Peter Tischendorf obtained a divorce in a German Court in the early part of 1977 and that the German divorce decree declared petitioner to be the party at fault or the "guilty spouse."

3. It is also my understanding that in proceedings held in 1979, this Court recognized the visitation rights of respondent, but postponed visitation of the boy in Germany until the summer of 1980. I also understand that respondent appeared before this Court in 1979 and stated that he would return the child to petitioner upon the expiration of any visitation period specified by this Court.

III. The Significance of the Proposed Hague Convention

It is important to note that the instant case involves a matter that is of worldwide concern. The steep rise in divorces within the last decade, including divorces among mixed-na-

tionality spouses, greater ease of international travel, and the growing incidence of custody disputes between fathers and mothers, have led to international child custody controversies to a degree not previously known.

Many children are wrongfully removed across international boundaries by a parent, and many children are wrongfully retained in another country after a visit with the non-custodial parent.

The Hague Conference on private International Law, which is a permanent organization of participating governments, recognized the seriousness of this problem in 1976; and for this reason placed the subject of international child abductions, including child retentions after visits, on its working agenda for 1976-1980. The Conference is in the process of drafting a Convention, under which signatory governments would assure the return of wrongfully removed or retained children to the country of origin and to the rightful custodian.

It was evident from the deliberations at the Hague in which I participated that in the absence of such a Convention the great majority of the 23 countries represented, including West Germany, are not legally bound to return abducted children or children who are retained after a visit abroad. Although custody decrees of one country are occasionally recognized by the courts of another country as a matter of comity, it is particularly difficult to obtain the return of a child from a foreign country when the child is staying with a parent who is a national of that country.

The proposed Convention would alleviate this growing problem. However, even if the text of the treaty should, as anticipated, be completed during the next Hague session in October 1980, it will take a long time, perhaps years, before it will go into effect between the various countries involved. Senate

advice and consent will be required for ratification in the United States.

IV. Opinion

The instant case is more complex than one of the typical situations considered at the Hague in which an American mother has been awarded custody in this country and the German father seeks visitation of the child in Germany. As has been pointed out, in the absence of an international Convention ratified by both countries and committing the visited country to the legal enforcement of the mother's custodial rights, the return of the child at the end of a visitation period is not assured. Similar to the legal situation that existed between the states within this country before the advent of the Uniform Child Custody Jurisdiction Act, a court in the visited country may change custody to the parent who is a citizen of that country, or in any event refuse to order the return of the child.

The instant case is aggravated by the fact that German divorce proceedings took place simultaneously with divorce proceedings in this Court. Consequently the instant case involves additional problems due to jurisdictional conflict and presumably conflicting custody decrees.

German divorce and custody law underwent a substantial revision with the enactment of the Divorce Reform Law of June 14, 1976. This law did not go into effect until July 1, 1977 (See Article 12 of the German Divorce Reform Law). When respondent obtained a divorce in a German court, the prior law was still in force. As has been noted, the German court declared petitioner to be the party at fault. According to section 1671 of the German Civil Code then in effect, "if only one of the parents is declared at fault and there are no serious grounds against the transfer of parental power, the Guardianship Court shall transfer it to the parent who is not at fault."

GERMAN CIVIL CODE (as amended to January 1, 1975), translated by Forrester, Goren, & Ilgen p. 257 (Rothman & Co. 1975) attached hereto.

Accordingly it must be assumed that following the divorce in the "Landgericht" (district court), a Guardianship Court in Germany awarded custody of the child to respondent. Thus there are two conflicting custody decrees effective in different countries. In the United States the mother is the custodial parent, whereas in Germany it is the father who has custody of the boy. As a result, regardless of any statements made by respondent within the United States, once the child is inside Germany, father and son are governed by German law and the decisions of the German courts, under which the father is the custodial parent. Even in the unlikely event that the Guardianship Court had not automatically, according to Section 1671 of the GERMAN CIVIL CODE, *supra*, awarded custody to respondent, this Court would have to face the fact, as has been pointed out above, that under present international legal conditions a German Court would be free to grant custody to the father and in any event would not be bound to return the child to the United States.

The legal situation is further aggravated by the fact that, as the German divorce court pointed out in its opinion, the German divorce proceedings were pending before a divorce action was instituted in the United States. According to German law, if "both spouses sue for divorce, the court, in which the action was pending first in time, has exclusive jurisdiction." GERMAN CODE OF CIVIL PROCEDURE section 606 (translation by affiant). Consequently, even though foreign divorces as such, as distinguished from custody orders, are under certain circumstances legally recognized under German law, the divorce in the instant case would not be recognized

in Germany because of the prior pendency of the German action. Moreover, the custody decree, which is part of the divorce decree of this Court, would not even qualify for possible recognition as a matter of comity in any German Court that would consider comity recognition under other circumstances.

Considering all the problems involved in the instant case, it must be concluded that the return of the child at the end of a visitation period in Germany is most unlikely, if respondent for any reason now or in the future, and particularly when the boy is in Germany, should decide to keep the child there. It must be added that it is not uncommon, when there is parental conflict over custody, that persons who are otherwise honorable and law-abiding will tend to take matters in their own hands. In the instant case any decision by respondent to retain the child would be permissible, as has been pointed out, under the law prevailing within Germany.

In my opinion, such commonly used safeguards as the posting of a bond or other security, would not in the instant case assure the return of the child.

The only feasible way I can see to avoid the likely untoward consequences of a trip of the boy to Germany would be a visitation order that is made conditional upon the submission to this Court, prior to the boy's departure, of a properly authenticated copy of a new judgment or other pronouncement of the appropriate German Court. This Court order or pronouncement should declare that the German Court recognizes petitioner's right to custody of the child, that it recognizes the limited nature of respondent's visitation rights, and that upon the expiration of any visitation period specified by this Court the German Court will enforce petitioner's custody rights and order the return of the child to petitioner. See *Levicky v. Levicky*, 140 A.2d 534, 538 (N.J. Super. 1958).

Finally, due to the juridictional conflict and the conflicting custody decrees, in my opinion visits with the child within the United States also require special safeguards, such as restrictions as to the geographical area within which visits may take place. However, a prior German court pronouncement containing the declarations just outlined would offer more effective protection for the child when visits take place in this country.

Respectfully submitted,

BRIGITTE M. BODENHEIMER

Subscribed and sworn to before me this 2nd day of July, 1980. Margaret S. Reinhart, Notary Public, Principal Office in Yolo County, California. My commission expires August 15, 1983.

APPENDIX G

DEPARTMENT OF STATE

Washington, D.C. 20520

June 20, 1980

Dear Mr. Vice President:

I am pleased to reply to your memorandum of May 27 requesting on behalf of Mr. Roger E. Montgomery information on child custody disputes in which children have been taken to another country or have been kept abroad by one parent. Mr. Montgomery has spoken to several people in the Office of Citizens Consular Services by telephone concerning his interest in the issue of international child abduction and has been given some of the following information already.

I will answer Mr. Montgomery's questions in the order in which they appeared in his letter:

1. The Department does not keep statistics, by year of reporting or type of custody dispute, of American or dual-national children taken to or detained in foreign countries by non-custodial parents. About three hundred cases now are pending in various stages of activity. Some have been pending

for several years. The number increases every week. Since parents whose children have been taken abroad do not always contact the Department, there surely are additional cases which we and our Foreign Service posts never hear about or which are known to the U.S. Embassies or Consulates abroad but not to us. Every day, the Department receives telephone calls from persons who are interested in learning what kind of assistance we can provide in such cases. No record is kept of these telephone calls unless a written reply is necessary or a telegram is sent to one of our Foreign Service posts requesting the post's assistance.

2. We do not keep statistics by country; however, we can state that almost one half of the cases of which we are aware involve Europe and Canada. Almost one third involve Latin America and the Caribbean countries. One sixth of the cases occur in the Middle East and North Africa. Many fewer arise in the rest of Africa, and the fewest in the Far East and South Pacific. Although we can provide assistance only in cases where children have been taken abroad, we are aware of a number of cases in which children living abroad with one parent have been brought to the United States against the wishes of the custodial parent.

3. Basically, the role of the Department in child custody disputes is, through its consular officers abroad, to help parents locate children who have been taken to other countries, to monitor the welfare of the children upon a parent's request, to provide general information about child custody laws and procedures which can be used to effect a child's return to the United States, and to furnish a list of attorneys in the foreign country if the parents cannot resolve their differences themselves or seem to need legal advice or assistance.

Consular officers have no legal authority to obtain physical custody of children and return them to the United States. They cannot offer legal advice, represent U.S. citizens in custody hearings before foreign courts, or attempt to influence the outcome of those hearings; however, they may monitor such hearings to ensure that the rights of the American parent or child under local law and generally-accepted international standards of justice are respected. Consular officers may not assist a parent in acquiring physical custody of a child illegally or by force or deception, nor may they help a parent to leave the foreign country with a child whose custody is disputed if their departure would violate a court order or the laws of the foreign country. They can, however, provide a passport for a U.S. citizen child whose custody is disputed if the parent has physical custody of the child and if they have not been informed that a local court has awarded custody to the other parent or forbidden the child's departure from the jurisdiction of the court or from the country.

Upon submission of a court order awarding custody of a child to one parent or restraining one parent from taking the child out of the jurisdiction of the court, Passport Services' Office of Citizenship Appeals and Legal Assistance can enter a notice in the child's name in Passport Services' computerized name-check system which should prevent the non-custodial parent from obtaining a passport for the child in the United States. This service does not prevent passport issuance abroad since most Foreign Service posts do not have the capability to clear names through the computerized name-check system and it is generally felt that to leave a child abroad without documentation would be prejudicial to his or her welfare. One benefit of entering a notice in a child's name is that when an application taken at a U.S. Embassy or Consulate arrives in

Washington and is cleared, the application would be marked for special attention, enabling us to provide the child's address to a parent who might not have known where the child had been taken. The Office of Citizenship Appeals and Legal Assistance estimates that, every year, it receives 2500-3000 requests for denial of passports in child custody cases. Once a passport has been issued to a child whose custody is contested, we have no authority to revoke it.

4. In general, U.S. citizens in Common Market countries have the same protection and alternatives as those in other countries. Recourse to the local courts is usually the only option if an amicable settlement cannot be reached; however, in some cases in which the court order regulating the custody of the children was issued in a Common Market country, relief may be available through a convention on the recognition and enforcement of decisions relating to the custody of children which was signed on May 20 by fifteen of the twenty-one members of the Council of Europe. The nations which signed the convention are Austria, Belgium, Cyprus, France, West Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Netherlands, Portugal, Spain, Switzerland, and the United Kingdom. We understand that the convention provides for the return of children taken from one signatory nation to another and the recognition of court orders issued by other signatory countries. It is our understanding that anyone who was awarded custody of children by a court in a country which ratified the convention would be able to benefit even if that person were not a citizen of any of the countries in the Council of Europe. It appears that the convention would also provide for the return of the child to the custodial parent if a parent whom the child was visiting in one of the other signatories refused to return the child.

5. We have no listing of child custody inquiries by state of origin.

6. Since some cases are resolved immediately and some never are, it is impossible to say how many years elapse between the "kidnapping" and the return of the child to the rightful custodial parent.

7. There is no typical case involving international child abduction by one parent. Many abductions occur before any ruling has been made concerning the custody of the children. Often a child is abducted during the non-custodial parent's exercise of visitation rights within the United States. Sometimes the parent who has been awarded custody takes the children abroad contrary to a court order or denies the non-custodial parent the right to visit the children or be visited by them. The Privacy Act would prevent us from releasing information from our files on various individuals without their consent, but as an enclosure to this letter I have prepared profiles which summarize the salient points of cases in which the Department or American Embassies or Consulates have been requested to assist. Many details were omitted for the sake of brevity and to protect the privacy of the persons involved. Brief sketches such as these cannot accurately reflect the anguish of parents whose children have been abducted, the unceasing efforts which some of them make to recover their children, or the diligence of consular officers in attempting to assist the parents in all ways possible.

8. Traditionally, the doctrine to which most states and foreign countries have adhered is that the presence of a child within a particular country rendered its courts competent to determine who should have custody of the child, regardless of any prior custody judgment issued in another state or country. As a result, it is not unusual to find conflicting custody decisions in different jurisdictions.

The Uniform Child Custody Jurisdiction Act was proposed as a relatively simple way for one state to recognize and enforce the custody decrees of other states. It has now been ratified by most of the states. The introduction of S. 105 (Parental Kidnapping Prevention Act) last year was a sign that many people consider that action on the Federal level is now necessary.

Since it is becoming increasingly difficult for a person in the United States to evade an order awarding custody to the other parent, persons who are not satisfied with a custody decree or who believe that a forthcoming custody order will be unfavorable are increasingly seeking refuge outside the United States. We know of no foreign country which will automatically accept or enforce a custody decree issued in the United States or order a child returned to the United States. Most countries will insist on rehearing a case on its merits. In many countries, a foreigner would have little chance of being awarded custody of a child if the other parent were a national of the country where the case is being heard. In some countries, the father is considered to have a dominant, if not absolute, right to custody of his children. Obviously, this situation would work against an American woman seeking custody of her children. In a small minority of such countries, when the father is a manifestly unfit parent the custody of the children often is given, not to the mother, but to the paternal grandfather.

The laws of the country where the child is physically present, even temporarily, are controlling. There is nothing that the U.S. government can do to force a foreign country to honor any U.S. court order regulating custody or visitation rights.

Even in countries where views of the family and parental rights parallel those in the United States, legal battles can be lengthy and can result in findings contrary to those made in

the United States. If the parent takes the child to a third country, the process must begin anew. The confusion and stress which children feel during these custody disputes can leave permanent psychological scars.

A desire to reduce the inequities, hardships, and expense involved in custody cases and to return children as soon as possible to familiar surroundings and the custodial parent is now being felt on an international level. The convention recently ratified, after six years of deliberation, by fifteen members of the Council of Europe is the result of motivations similar to those which impelled the formulation and ratification of the Uniform Child Custody Jurisdiction Act in the United States. Two members of the Council of Europe, France and Germany, have expressed an interest in implementing the Uniform Child Custody Jurisdiction Act by declarations of reciprocity with certain states in the United States. France mentioned, in particular, its interest in lowering the high costs involved in relitigating custody cases and obtaining the return of children who have been abducted or wrongfully detained and the high bonds which persons in the United States and France are required to post in order to visit or receive visits from their children since there now exists no mechanism for ensuring that children will be returned to the rightful custodial parent following visitation.

The United States, twelve of the fifteen European nations which ratified the convention mentioned above, and ten other members of the Hague Conference have been meeting periodically for over a year in an attempt to formulate an international agreement on international child abduction and related matters. A preliminary draft of the treaty was prepared at the most recent meeting and will be discussed at the quadrennial session of The Hague Conference later this year. One sec-

tion of the draft convention deals with the protection and enforcement of visitation rights. At a discussion of the draft convention in January, several members of the Study Group on International Child Abduction, part of the Secretary's Advisory Committee on Private International Law, expressed reservations about this section since, once a parent has applied for and been granted visitation rights pursuant to the convention, there would be nothing to prevent him or her from taking the children to a third country and refusing to send them back to the country of origin. The March 1980 issue of *The Single Parent*, the journal of Parents without Partners, contains an article on the draft convention by Robert D. Westgate who attended the January meeting of the Study Group on International Child Abduction. The Office of Citizens Consular Services recommended this article to Mr. Montgomery. Another article on transnational child abduction and the proposed convention appeared page B14 of the January 29 edition of the *New York Times*.

Until an international agreement goes into effect, U.S. citizens who wish to obtain enforcement abroad of U.S. court orders concerning child custody and visitation must seek redress in the courts of the foreign country involved unless an agreement can be reached with the other parent. Nothing can guarantee that a parent who asserts that a child will be returned following the exercise of visitation rights is acting in good faith.

I trust that you and Mr. Montgomery will find this information helpful.

Respectfully,

J. BRIAN ATWOOD
Assistant Secretary
for Congressional Relations

Enclosures:

1. Correspondence Returned.
2. Summaries of cases.

CASE SUMMARIES

1. A U.S. citizen woman, her foreign husband, and their young dual-national child went to visit the husband's family in Europe. The young man apparently decided that he did not wish to return to the United States. The young woman found the conditions in her husband's native village primitive and feared for the health of her child. She wished to return to the United States with the child, but her husband's family would not let her. Eventually she returned alone due to her second pregnancy and her belief that she would not be allowed to remain in the country.

After the women returned she asked the U.S. Embassy to ascertain that the child was healthy and receiving proper care. Since the village was a considerable distance from the Embassy, the Embassy initially requested the assistance of local officials who reported that the child seemed fine. When the Embassy contacted the husband by telephone, he indicated that the child was well.

Shortly thereafter, the young man was drafted into the local armed forces. The child's paternal grandfather originally indicated that he would make arrangements for the child's return to the United States, but later refused to do so. The Embassy helped the mother to obtain legal counsel in the foreign country, and a consular officer paid a personal visit to the child.

The foreign country has no specific laws regulating child custody. In the absence of a divorce, each parent has an equal right to the child. Normally in divorce proceedings, the mother receives custody of a child under the age of seven, but the woman was apprehensive because her attorney had told her

that since she had left the child, was a foreigner, and was dependent on her parents for support she might be at a disadvantage in a custody proceeding. In addition, she was unsure that she wished to divorce her husband. He was anxious for her to return to him, bringing their second child.

When her husband's military service was completed a few months later, the woman, a relative, and her attorney visited him in his native village and were able to reach a solution satisfactory to the young woman.

2. Several years ago, a U.S. citizen couple was divorced. The man was awarded custody of the children. The mother took the children to another state. A court in that state found her an unfit parent and returned the children to the father. The mother was granted reasonable visitation rights.

On a visit two years later, the mother failed to return the children to their father. He initiated a search for the children and finally ascertained that they had been taken to Germany. He went to Germany to retrieve them. His ex-wife agreed to allow them to return to the United States, but on the day of their proposed departure one of the children was ill. The mother promised to bring the child to the United States as soon as the child was well. She did not abide by her promise.

A few months later, the father received notification that the mother was taking steps to obtain legal custody of the child in Germany. He contacted the Department to find out what he should do. He was advised that since an agreement with his wife did not appear likely at that point, he could best protect his rights by engaging an attorney in Germany to contest his ex-wife's suit.

Since another child had alleged mistreatment by the stepfather, the local Foreign Service Post was asked to check on the welfare of the child who had remained in Germany. The

child appeared to be well and happy and the living conditions satisfactory. As is required in all child custody cases in Germany, a local social welfare office investigated the family and came to the same conclusions. The mother has contended that the father had no legal right to take the other children since his U.S. court orders were not binding in Germany. The case is pending in the German courts.

3. A court in the United States awarded custody of a dual-national child to the foreign parent. The U.S. citizen mother was granted regular visitation. She learned that her ex-husband planned to take the child to Germany permanently which would seriously impair her ability to see her child regularly. She obtained a U.S. court order requiring the father to post a $5000 bond to ensure that he would not take the child out of the state without the court's permission. The father left the United States with the child without posting the bond or obtaining the court's permission.

A short while later, the mother was informed that her ex-husband was seeking enforcement of the U.S. custody decree in Germany. The mother then petitioned the court which had issued the original decree to amend it to grant her custody of the child. The court complied with her request, stating that the amended ruling would remain in effect until the child was returned to the jurisdiction of the court which, presumably, would then reexamine the case and make arrangements for the permanent custody of the child. The local U.S. foreign service post assisted the mother in finding a local attorney to represent her interests in the German courts.

At about the same time, the father submitted a copy of the original court decree to Passport Services and requested that his child not be issued a U.S. passport except with his permission. A notice was placed in Passport Services' computerized

name-check system; however, if the mother obtains physical custody of the child and presents a copy of a court order revoking the original decree, she could obtain a passport on behalf of the child.

The mother travelled to Germany to try to obtain enforcement of the amended custody decree. She was forced to return to the United States after several months due to a shortage of funds. It appears that she will have to return to Germany when the court has made arrangements for her and her ex-husband to be examined by a psychiatrist.

The local foreign service post has been instrumental in obtaining the father's consent for the child to correspond with the mother. The post is under the impression that the disparity in the financial situations of the parents may work to the mother's disadvantage in the German courts since the father can provide a much higher standard of living for the child than she would be able to do.

4. An alien woman obtained legal custody of her U.S.-born child in proceedings in the United States. Her ex-husband, a U.S. citizen, was granted visitation rights. Shortly thereafter, she took the child to her native country and denied the father the right to visit or communicate with the child. She would not allow her relatives in the foreign country to tell the father where she and the child were. She informed the father, through her relatives, that she wished to have nothing further to do with him and voluntarily relinquished the court-ordered alimony and support payments which he had been making.

In desperation, the father turned to the Department for assistance. The U.S. Embassy in the foreign country contacted the woman's relatives and asked that she get in touch with the Embassy. She did, but refused to provide information other

than that the child was well. She will not allow the father to visit the child, apparently believing that he would kidnap the child although he has stated he would not.

As an impasse exists, the father's only option is to attempt, through the courts in the foreign country, to obtain enforcement of the visitation rights established by the U.S. custody decree.

5. A U.S. citizen went abroad with her husband and their U.S. born child. All three were considered citizens of the country in which they took up residence. The couple began divorce proceedings in the foreign country. Under the country's laws, the father has custodial rights unless he has abdicated or been deprived of them. A child requires the permission of the father to leave the country. The local court issued an order to prevent the child's departure from the country, but the U.S. Embassy was not informed of its existence. The woman obtained a passport in her maiden name and had the child's name added to it. The man was awarded custody of the child, and the woman left the country with the child. The man accused her of kidnapping and named the Embassy as an accessory for its role in including the child's name in the mother's passport.

The mother obtained a U.S. court order granting her custody of the child. Two years later, the man kidnapped the child and returned to his native country. Each parent alleged that the other kept the child in virtual imprisonment to prevent kidnapping. An officer from the Embassy met with the man and his attorney to discuss the situation and the mother's visitation rights. When the woman returned to the foreign country to visit her child, the Embassy arranged for her protection. The mother considered requesting a new custody hearing in the foreign country, but it appeared that such a hearing would not be any more successful than the first since her departure

with the child in violation to a court order would have been detrimental to her case as would her residence outside the foreign country.

6. An American citizen telephoned the Department and said that she had been awarded custody of her dual-national child and had permitted her foreign ex-husband to take the child to his native country for a vacation. As she had not heard from her ex-husband since their departure, she was becoming anxious that he might intend to keep the child there. She did not know the names or address of the relatives with whom they were staying, but did have a telephone number of another relative in a suburb of the capitol city. She asked that the Embassy check the child's well-being and discreetly try to find out her ex-husband's intentions. It appeared that the child was well and that the father planned to return to the United States with the child at the end of the summer. Whether he will do so remains to be seen.